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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION**

IN RE PACIFIC FERTILITY CENTER
 LITIGATION

Case No. 3:18-cv-01586-JSC

**FIRST AMENDED CONSOLIDATED
 CLASS ACTION COMPLAINT**

DEMAND FOR JURY TRIAL

REDACTED FILED UNDER SEAL

TABLE OF CONTENTS

NATURE OF THE ACTION	1
JURISDICTION AND VENUE	3
INTRADISTRICT ASSIGNMENT.....	4
PARTIES	4
A. Plaintiffs.....	4
B. Defendants	4
1. Prelude and Pacific MSO.....	4
2. PFC	5
3. Chart.....	6
FACTUAL ALLEGATIONS	6
I. [REDACTED] for the Safe Storage of Plaintiffs’ Eggs and Embryos at the Time of the Incident.....	6
A. Background on Cryopreservation and Freezer Storage.	7
B. PFC markets cryopreservation and freezer storage services as an insurance policy.....	8
C. PFC represented on its website, and in sales and marketing materials, that it would keep Plaintiffs’ eggs and embryos safe in a state-of-the-art facility.....	9
D. PFC [REDACTED] to Prelude in September 2017 Without Advising Plaintiffs.	11
II. Precision and Care Are Required in the Retrieval, Cryopreservation and Storage of Eggs and Embryos.	12
A. The process of retrieving and storing eggs and embryos is demanding, time consuming, and expensive.	12
B. The loss of eggs and embryos results in emotional distress, pain, and suffering.	14
C. Successful cryopreservation and storage depend on strict adherence to protocols.....	14
III. Prelude Caused Irreparable Harm to Plaintiffs by Failing to Protect Their Eggs and Embryos.	16

1	A.	Prelude should have had systems and processes in place to ensure that Plaintiffs’ eggs and embryos were not damaged.	16
2	B.	Chart recalled cryostorage tanks for vacuum seal defects after the Tank 4 incident.....	17
3	C.	Multiple investigations were opened after the Tank 4 incident.....	18
4	D.	Prelude’s failure to keep Plaintiffs’ eggs and embryos safe and secure has resulted in harm.....	18
5	E.	PFC’s communications regarding the incident have compounded the harm.....	20
6			
7			
8		PLAINTIFF-SPECIFIC ALLEGATIONS	22
9		CLASS ACTION ALLEGATIONS	28
10		CLAIMS FOR RELIEF	30
11		FIRST CAUSE OF ACTION Negligence and/or Gross Negligence (Against Prelude and Pacific MSO).....	30
12		SECOND CAUSE OF ACTION Negligent Failure to Recall (Against Chart).....	33
13		THIRD CAUSE OF ACTION Bailment (Against Prelude and Pacific MSO)	33
14		FOURTH CAUSE OF ACTION Premises Liability (Against Prelude and Pacific MSO)	34
15		FIFTH CAUSE OF ACTION Violations of the Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 <i>et seq.</i> (Against Prelude, Pacific MSO, Chart, and PFC)	35
16		SIXTH CAUSE OF ACTION Violations of the Consumers Legal Remedies Act, Cal. Civ. Code § 1750 <i>et seq.</i> (Against PFC, Prelude, and Pacific MSO).....	39
17		SEVENTH CAUSE OF ACTION Fraudulent Concealment (Against PFC, Prelude, and Pacific MSO)	42
18		EIGHTH CAUSE OF ACTION Strict Products Liability – Failure to Warn (Against Chart)...	44
19		NINTH CAUSE OF ACTION Strict Products Liability – Manufacturing Defect (Against Chart)	45
20		TENTH CAUSE OF ACTION Strict Products Liability – Design Defect – Consumer Expectations Test (Against Chart).....	45
21		ELEVENTH CAUSE OF ACTION Strict Products Liability – Design Defect – Risk-Utility Test (Against Chart).....	46
22			
23		PRAYER FOR RELIEF	46
24		DEMAND FOR JURY TRIAL	47
25			
26			
27			
28			

1 Plaintiffs A.B., C.D., E.F., G.H., I.J., K.L., M.N., and O.P. (“Plaintiffs”), individually and on
 2 behalf of all others similarly situated, file this First Amended Consolidated Class Action Complaint
 3 against Defendants Prelude Fertility, Inc. (“Prelude”), Pacific MSO, LLC (“Pacific MSO”), Chart, Inc.
 4 (“Chart”), and San Francisco Fertility Centers, d/b/a Pacific Fertility Center (“PFC”), and allege as
 5 follows:

6 NATURE OF THE ACTION

7 1. PFC markets and sells fertility services, including fertility treatment, egg and embryo
 8 cryopreservation, and long-term freezer storage services. On its website and in sales and marketing
 9 materials, PFC likens cryopreservation to an insurance policy for women and families, claiming the
 10 services provide peace of mind to those who wish to defer having children and relief to those seeking to
 11 overcome a diagnosis of infertility.

12 2. Cryopreservation involves preservation of tissue—here, human eggs and embryos—
 13 using cooling techniques. In the 1980s, facilities began using a cryopreservation technique known as
 14 “slow freezing” to preserve human reproductive tissue. Cryopreservation became more prevalent after
 15 the advent in the early 2000s of vitrification, a process by which tissue is cooled more quickly, leading
 16 to higher egg and embryo survival rates. Eggs and embryos frozen through cryopreservation are stored
 17 in specially designed metal tanks.

18 3. The use of appropriate technologies and maintenance protocols is necessary to ensure
 19 the safekeeping of cryopreserved eggs and embryos. Safe long-term storage requires backup
 20 redundancies to guard against catastrophic failure, regular inspections of the tanks, and automated
 21 temperature and fill-level gauges linked to alarm systems to notify staff immediately of a potential
 22 failure.

23 4. Between 2010 and 2016 Plaintiffs decided to undergo fertility treatment at PFC and to
 24 procure long-term freezer storage services for their eggs and embryos at its San Francisco facility.

25 5. Unbeknownst to Plaintiffs, [REDACTED], which operates
 26 a national network of egg and embryo long-term freezer storage facilities, [REDACTED]. Under
 27 [REDACTED], Prelude, an unlicensed, non-medical corporation, [REDACTED]
 28 [REDACTED]

1 [REDACTED]
2 [REDACTED] Prelude has no doctors on staff and provides only non-clinical services. Despite multiple
3 opportunities to do so, neither PFC nor Prelude notified Plaintiffs of the Prelude-PFC transaction or that
4 because of it, [REDACTED] (and the doctors it employs) [REDACTED]
5 [REDACTED]. Instead, on its website and in other sales and marketing materials, [REDACTED]
6 [REDACTED].

7 6. On March 4, 2018, Prelude discovered that the liquid nitrogen levels in a tank known as
8 “Tank 4” had dropped to an unsafe level for an undetermined period of time, destroying or jeopardizing
9 the eggs and embryos stored in the tank, including Plaintiffs’ stored tissue. Chart manufactured Tank 4.

10 7. Plaintiffs were first notified of the Tank 4 failure via an email sent at approximately 4:00
11 a.m. Pacific time on Sunday, March 11, 2018. The email described the failure as “a very unfortunate
12 incident” in which the storage tank containing Plaintiffs’ cryopreserved eggs and embryos “lost liquid
13 nitrogen for a brief period of time,” and stated that a “preliminary analysis” suggested some of the eggs
14 and embryos in the tank may have been destroyed. It has now been confirmed that a substantial portion
15 of the eggs and embryos contained in Tank 4 were destroyed in the incident.

16 8. Over a month later, on April 19, 2018, Plaintiffs and others whose eggs and embryos
17 had been stored in Tank 4 received another email—this time notifying them that an investigation had
18 revealed that the incident “likely involved a failure of the tank’s vacuum seal.” Four days later, on April
19 23, 2018, Chart recalled several of its cryopreservation tanks, citing “reports of a vacuum leak or failure
20 that could compromise the product.”

21 9. As of March 4, 2018, [REDACTED] for operating Tank 4, monitoring Tank
22 4’s performance for fluctuations in temperature or liquid nitrogen levels, and maintaining safety and
23 backup systems to mitigate any harm that a tank failure might cause. But Prelude failed to safely
24 preserve the eggs and embryos under its care, including the eggs and embryos belonging to Plaintiffs.

25 10. As a result of the incident, Plaintiffs have suffered harm. For many, the tissue in Tank 4
26 represented their last and only chance for a biological child. PFC and Prelude have informed Plaintiffs
27 that it is not possible to know whether their eggs or embryos are viable until they are thawed and (for
28 eggs) fertilized and that, even then, the survival cannot be determined without attempting a pregnancy.

1 PFC has also warned the proposed class that attempted pregnancies with Tank 4 embryos may involve
2 “additional risks [that are] unknown at this time.” The resulting uncertainty has caused Plaintiffs—who
3 are now unable to generate eggs of the same quality as when their eggs were extracted—to experience
4 pain and suffering.

5 11. As to Prelude, Plaintiffs bring claims for negligence, premises liability, bailment, and
6 violations of California’s Unfair Competition Law (“UCL”) arising out of Prelude’s failure to
7 adequately store and maintain Plaintiffs’ eggs and embryos. Plaintiffs also assert omissions-based fraud
8 claims against Prelude for failing to disclose [REDACTED]
9 [REDACTED], that it lacks a medical or tissue bank license, and that the processes it had in place to protect
10 Plaintiffs’ tissue were inadequate. As to Chart, Plaintiffs assert claims for strict products liability, for
11 negligent failure to recall, and under the UCL based on Chart’s defective design and manufacture of
12 Tank 4 and failure to warn of its defective nature. As to PFC, Plaintiffs assert omissions-based fraud
13 claims arising out of PFC’s failure to disclose [REDACTED]
14 [REDACTED] and that Prelude’s prevailing systems and processes in place for safe storage were
15 inadequate.

16 JURISDICTION AND VENUE

17 12. This Court has subject matter jurisdiction over this action under the Class Action
18 Fairness Act of 2005, 28 U.S.C. § 1332(d), because (a) Plaintiffs are citizens of states different from
19 Defendants; (b) the amount in controversy exceeds \$5,000,000, excluding interest and costs; (c) the
20 proposed class consists of more than 100 individuals; and (d) none of the exceptions under the
21 subsection applies to this action.

22 13. This Court has personal jurisdiction over Defendants. They conduct substantial business
23 in California and intentionally availed themselves of the laws and markets of this state. A significant
24 portion of the acts and omissions at issue occurred in California, and Plaintiffs and many class
25 members suffered harm in California. Plaintiffs’ claims against Defendants are meaningfully connected
26 to California in that: (1) each Plaintiff had eggs or embryos stored at PFC, which is located in
27 California and within the Prelude network; and (2) each Plaintiff had eggs or embryos stored in Chart’s
28

1 tank, which was physically located at PFC's San Francisco facility, and which failed, resulting in
2 damage to Plaintiffs.

3 14. Venue is proper in this District under 28 U.S.C. § 1391 because a substantial part of the
4 events or omissions giving rise to Plaintiffs' claims occurred in this District.

5 **INTRADISTRICT ASSIGNMENT**

6 15. Assignment to the San Francisco Division is proper under Local Rules 3-2(c) and (d)
7 because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in San
8 Francisco.

9 **PARTIES**

10 **A. Plaintiffs**

11 16. Plaintiff A.B. is a citizen and resident of Wyandot County, Ohio.

12 17. Plaintiff C.D. is a citizen and resident of Wyandot County, Ohio.

13 18. Plaintiff E.F. is a citizen and resident of San Francisco County, California.

14 19. Plaintiff G.H. is a citizen and resident of San Francisco County, California.

15 20. Plaintiff I.J. is a citizen and resident of Contra Costa County, California.

16 21. Plaintiff K.L. is a citizen and resident of San Francisco County, California.

17 22. Plaintiff M.N. is a citizen and resident of San Francisco County, California.

18 23. Plaintiff O.P. is a citizen and resident of San Mateo County, California.

19 24. Given the sensitive nature of their claims and the services they purchased from PFC and
20 Prelude, Plaintiffs are using initials in this litigation to protect their privacy. If so directed by the Court,
21 Plaintiffs will seek permission to proceed under these pseudonyms.

22 **B. Defendants**

23 **1. Prelude and Pacific MSO**

24 25. At all relevant times, Defendant Prelude Fertility, Inc. was a Delaware corporation
25 headquartered in Florida. Prelude operates the largest frozen donor egg bank in North America, in
26 addition to a network of egg and embryo storage facilities—including PFC—across the country.

27 26. Prelude was founded in 2016 by startup entrepreneur Martin Varsavsky with a \$200
28 million investment by New York-based Lee Equity Partners. Prelude's stated business plan is to create

1 a national network of egg and embryo storage centers. According to Varsavsky, “What Prelude does is
2 bridge the gap, it makes people’s biology meet their psychology” through “The Prelude Method”: “You
3 freeze your gametes when fertile, thaw them and create embryos when ready, genetically sequence the
4 embryos, and then transfer one embryo at a time. And you continue to do this until you achieve your
5 desired number of children.”

6 27. Prelude added PFC to its national network of fertility clinics and storage facilities in
7 September 2017.

8 28. In conjunction with its transaction with PFC, on September 15, 2017, Prelude formed
9 Pacific MSO, LLC, a wholly owned subsidiary, [REDACTED]
10 [REDACTED]. Pacific MSO is a Delaware corporation with its principal executive
11 office located at 55 Francisco Street, Suite 500—the same location as PFC’s office.

12 29. Prelude describes “egg freezing, in vitro fertilization (IVF), genetic screening of
13 embryos, and donor egg matching” as part of “Prelude’s comprehensive services.”

14 [REDACTED] Prelude, independently or through its qualified subsidiary Defendant Pacific MSO,
15 [REDACTED]. At
16 the time of the incident, [REDACTED]
17 [REDACTED].

18 31. Neither Prelude nor Pacific MSO is licensed to provide medical services. Prelude and
19 Pacific MSO provide only non-clinical (*i.e.*, non-medical) services and do not employ any physicians.

20 2. PFC

21 32. PFC is a private unincorporated entity located at 55 Francisco Street, Suite 500, San
22 Francisco, California 94133.

23 33. PFC was founded in 1999 and advertises a full range of fertility services, including egg
24 cryopreservation, IVF, genetic testing, “cutting-edge laboratory techniques and technology such as . . .
25 vitrification,” and storage of cryopreserved eggs and embryos.

26 34. At all relevant times, Plaintiffs’ eggs and embryos were stored at a laboratory located at
27 PFC’s San Francisco facility.
28

35. At the time of the incident on March 4, 2018, Tank 4 was located at PFC's San Francisco facility.

3. Chart

36. Defendant Chart, Inc. is a Delaware corporation headquartered in Georgia.

37. Founded in 1992, Chart is a publicly traded global manufacturer of equipment used in the production, storage, and application of industrial gases. Chart produces a variety of cryogenic equipment. On its website, Chart states that its "focus is cryogenics." Chart claims that its products "utilize our proprietary vacuum and insulation technologies, including storage equipment," and that "[o]ur industry-proven core-competency provides the highest insulation thermal performance in cryogenics[.]" Chart holds itself out as "a recognized global brand for the design and manufacture of highly engineered cryogenic equipment" and a "leading global manufacturer of vacuum insulated products and cryogenic systems."

38. Chart, through its MVE brand, sells a line of cryogenic equipment that includes freezers and metal storage tanks. Chart claims that its MVE brand "is the benchmark for biological storage systems, used for the cryogenic preservation of human . . . tissues."

39. Chart states that its "cryobiological storage products include vacuum insulated containment vessels for the storage of biological materials." Chart describes the competition for cryobiological storage products as "significant" and notes that "competition in this field is focused on design, reliability, and price."

40. Chart designed and manufactured Tank 4, the storage tank in which Plaintiffs' eggs and embryos were stored on the date of the incident at issue in this lawsuit.

FACTUAL ALLEGATIONS

I. [REDACTED] for the Safe Storage of Plaintiffs' Eggs and Embryos at the Time of the Incident.

41. Prelude claims that it is "on a mission" to provide "the best options, science, and care so everyone can have the opportunity to be a mom or dad when they are ready." According to Martin Varsavsky, Prelude's Founder and Executive Chairman, and self-described "serial tech entrepreneur":

1 The Prelude method is for anyone who would like to have healthy babies when they are
2 ready. To increase the chances of having healthy babies when they are ready. . . . Right
3 now we live in a society in which we leave to chance one of the most important aspects
4 of our life which is to have children. We leave it to chance and frequently we face
5 adverse outcomes. . . . What we want is . . . for people to have healthy babies in a reliable
6 way. . . . To work on your career when you want to work on your career, to do your
7 maternity when you want to do your maternity

8 42. As alleged below, as of September 2017 [REDACTED] for the safe storage
9 of Plaintiffs' eggs and embryos. Safe storage requires maintaining functional alarm, monitoring, liquid
10 nitrogen autofilling, and backup systems—all safety measures PFC represented on its website that it
11 had in place to ensure the safe storage of Plaintiffs' eggs and embryos.

12 **A. Background on Cryopreservation and Freezer Storage.**

13 43. Cryopreservation is the process of vitrifying (freezing) eggs and embryos and is
14 conducted by personnel after a doctor has retrieved the necessary biologic material from a patient.
15 Freezer storage is the service that provides for the storage of the vitrified eggs or embryos and is
16 overseen by non-clinical personnel. Freezer storage facilities are often in different locations from the
17 clinics where doctors retrieve the biologic material, and sometimes are even in different locations from
18 the facilities where the cryopreservation was performed.

19 44. Successful storage of eggs and embryos requires stocking the storage facility with the
20 necessary and appropriate equipment (such as tanks, controllers, liquid nitrogen autofillers, and
21 alarms), properly maintaining that equipment, logging the results of regular inspections, and adhering
22 strictly to the systems and protocols in place to protect against harm to eggs and embryos that may
23 result from tank failure, changes in temperature, or declining liquid nitrogen levels.

24 45. Stocking a storage facility with the proper equipment and strictly following the
25 designated protocols is of critical importance given the value of human eggs and embryos to the
26 individuals and families who deposit them for safekeeping.

27 46. Human eggs, also known as oocytes, are a limited resource. According to PFC, a woman
28 has about one million eggs at birth, and this supply diminishes at the rate of about 1,000 per month,
beginning at her birth. This decline is part of the natural aging process and is commonly referred to as a
woman's biological clock. The loss of oocytes from the ovaries continues in the absence of menstrual
cycles, and even when women are pregnant, nursing, or taking oral contraceptives. In addition, as PFC

acknowledges on its website, egg quality diminishes with time, with miscarriages and chromosomal abnormalities occurring more frequently for women who are older at the time of pregnancy. By their early-to-mid 40s, it becomes very difficult for women to conceive a child naturally.

47. The purpose of egg and embryo cryopreservation and storage is to allow women and their reproductive partners to preserve their reproductive material so that they may be fertilized (for eggs) and implanted (for embryos) at a later time. Prelude highlights egg freezing on its website as a means of preserving options, and allowing women to “[f]ind that right person. Focus on your career. Finish your education. . . . Freeze your eggs to preserve your option to build a family when you're ready. . . Set it and forget it until you're ready.”

48. PFC emphasizes on its website and in sales and marketing materials that egg and embryo cryopreservation and storage allows for flexibility in family planning. That, in turn, PFC notes, gives women freedom, including the freedom to wait for the right child-rearing partner or to focus on their careers during their most fertile years.

B. PFC markets cryopreservation and freezer storage services as an insurance policy.

49. According to its website, PFC provides egg and embryo cryopreservation services (up until the point of storage) as a means of preserving “a precious resource, limited to just a few years of your life[,]” and further states that cryopreserving eggs and embryos “can increase your chances of conception by 5 to 10 times.”

50. PFC—through its website—emphasizes that people like Plaintiffs can achieve flexibility and insurance in family planning by purchasing its services:

6 Reasons to Preserve Your Fertility Today! (1) For a future family . . . (2) To allow for educational pursuits . . . (3) To have time to develop a business or career . . . (4) To give your relationship time to mature . . . (5) To reduce the risk of medical treatments that might impact fertility . . . (6) To achieve control over your future.

51. PFC also promotes—on its website and in sales and marketing materials—its egg and embryo cryopreservation services to people diagnosed with infertility, which it describes as a “workable challenge.”

52. Infertility is defined as the inability to conceive after one year of unprotected intercourse if a woman is under the age of 35, or after six months if a woman is 35 or older.

53. For many individuals and couples experiencing infertility, PFC's embryo cryopreservation services represented their only hope of having a biological child or of having children who are biological siblings.

C. PFC represented on its website, and in sales and marketing materials, that it would keep Plaintiffs' eggs and embryos safe in a state-of-the-art facility.

54. Before Plaintiffs' purchases of cryopreservation and storage services, PFC—on its website and in its sales and marketing materials—emphasized (and it continues to emphasize today) that eggs and embryos will be safely stored, indefinitely, for future family planning. The below representations can all be found on PFC's website and existed there prior to Plaintiffs' purchases of frozen storage services.

55. PFC states that its customers' "[e]ggs remain frozen until you need them" and that "there is no limit to how long cells remain viable in the frozen state."

56. Regarding embryos, PFC similarly explains that some customers "have come back after 10-15 years and the embryos have been thawed successfully and created healthy babies."

57. PFC claims that its facility is state of the art, meeting a "gold standard," and that it has a large and experienced staff dedicated to the "care and well-being of eggs, embryos and sperm."

58. The main techniques to cryopreserve eggs and embryos have been slow freezing and vitrification. With slow freezing—first used in 1986—it takes about two hours for eggs to reach final storing temperature. Starting in the mid-2000s, eggs and embryos began to be preserved through a rapid cryopreservation process called vitrification.

59. Vitrification is a more advanced and reliable technology that PFC describes as being "used in the embryo and egg freezing process so that they can be stored for later use." PFC states the newer vitrification process is safer than earlier slow-freezing technologies, which could lead to crystallization threatening the viability of cryopreserved tissue. "Avoiding ice formation in this way," PFC represents, "successfully protects the embryos from damage and allows them to be warmed later

1 giving survival rates consistently above 90%.” “Over 90% of frozen eggs, on average, survive the
2 freeze-thaw process” according to PFC.

3 60. PFC further states that all eggs and embryos are stored in vacuum-lined liquid nitrogen
4 tanks—“like a large thermos flask”—that “are computer controlled and monitored 7 days a week with a
5 dedicated alarm system.”

6 61. PFC claims that liquid nitrogen “is very stable and easy to work with” and that each tank
7 is equipped with numerous sensors to monitor temperature increases above -196°C or a drop in the
8 level of liquid nitrogen. PFC also represents that the sensors “are connected to a telephone alarm
9 system that will alert staff to an alarm condition outside of normal working hours. . . . The alarm
10 system is tested weekly and continues to run on battery power in the event of a power failure. The
11 alarm system can also be checked remotely.” When a tank alarm goes off, the on-call embryologist is
12 supposed to arrive within 30 minutes regardless of time of day and must conduct a physical inspection
13 of the tank before the alarm can be turned off.

14 62. PFC further claims that, in addition to constant electronic monitoring, each tank “gets a
15 physical inspection daily, looking for problems or signs of problems,” and that the amount of nitrogen
16 in the tank “is assessed as a means of monitoring for a possible slow leak or an impending tank failure.”

17 63. On its website, PFC emphasizes its use of liquid nitrogen autofillers, which it represents
18 are needed because the nitrogen in the tanks continuously evaporates at a slow rate:

19 Embryos and sperm in freezers don’t actually need power at all, provided that
20 we physically fill the cryo tanks with liquid nitrogen once or twice a week.
21 The computers that usually monitor and automatically fill these tanks do need
22 power of course, but they are not essential to maintain refrigeration.

23 64. PFC also emphasized on its website that a functional monitoring, alarm, and autofilling
24 system mitigated any risk presented to Plaintiffs’ eggs and embryos, explaining that computerized
25 controllers were constantly monitoring and addressing any issues: “the computer is monitoring and
26 maintaining the liquid nitrogen levels most of the time in the same way that the autopilot on an airplane
27 does most of the flying.”

28 65. PFC likewise advertises the durability of its tanks and storage facility on its website:

1 The storage tanks require no power and would not be impacted by a power
2 failure or blackout. They are made of metal and would probably survive a
3 small or moderate fire. If the tanks were not physically damaged or knocked
4 over in a disaster, they should survive intact. Even if no one was able to
physically check the tanks, or if we were unable to obtain liquid nitrogen, the
tanks should still maintain their temperature for several days.

5 **D. PFC [REDACTED] in September 2017 Without**
6 **Advising Plaintiffs.**

7 66. Plaintiffs and class members engaged PFC to provide egg retrieval, embryo creation,
8 and cryopreservation services. Many also paid PFC for long-term storage of their eggs and embryos
9 after the cryopreservation services were complete.

10 67. In September 2017, without advising Plaintiffs, [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 69. [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28

70. Prelude is a non-medical entity, has no license to perform medical services, and has no doctors on staff. Concurrently with the Prelude-PFC transaction—months before the Tank 4 incident—Prelude’s subsidiary, Pacific MSO, amended its articles of incorporation to reflect that “[t]he Corporation is no longer engaging in the profession of medicine”

71. [REDACTED]. Prelude also did not disclose [REDACTED] that it was unlicensed, or that its employees were wholly non-medical.

II. Precision and Care Are Required in the Retrieval, Cryopreservation and Storage of Eggs and Embryos.

A. The process of retrieving and storing eggs and embryos is demanding, time consuming, and expensive.

72. People who engage in fertility services and cryopreservation make large monetary and emotional investments. They endure painful and invasive procedures, financial stress, and the strain the process puts on their mental health and relationships with others, all in the hopes that one day they will be able to have a child.

73. Women take drug and hormone cocktails and injections over several weeks to stabilize the uterine lining, stimulate ovaries into producing follicles, and stop these ovary follicles from releasing eggs. Then, after an ovulation trigger injection, eggs are collected under sedation or a general anesthetic. A woman may be subjected to multiple injections each day, resulting in bruising, swelling, and discomfort. The drug and hormone therapy may also trigger other side effects, such as tiredness, nausea, headaches, and blood clots, as well as negative emotions. The process can limit travel and other activities, and often requires time off from work. The retrieval procedure itself requires insertion of a thick needle through the vaginal wall to drain the ovary follicles of their fluid. After the procedure, a woman often experiences residual pain for about a week and may need bed rest for several days. Some women suffer significant side effects, such as ovarian hyperstimulation syndrome, requiring hospitalization.

1 74. PFC acknowledges on its website that undergoing egg retrieval is “emotionally trying”
2 and physically demanding. PFC recognizes that “the time and energy that is needed, both physically
3 and emotionally can drain even the staunchest crusader.”

4 75. Infertility is associated with anger, depression, anxiety, marital problems, and loss of
5 self-esteem among prospective parents. PFC warns customers online that they may experience intense
6 anger, despair, and guilt, and that it is “is very common to experience symptoms of anxiety and
7 depression as a result of this experience.”

8 76. The egg retrieval process compounds these emotions and stresses. For many, this
9 process represents their last hope for having children. Each cycle can produce anxiety and fear that not
10 enough eggs will be retrieved, or that the eggs retrieved will not be of a high enough quality. Multiple
11 cycles are often required. Many women experience and express strong feelings of anxiety, failure,
12 hopelessness, and disappointment during this process.

13 77. Prelude is also aware of the vulnerability experienced by individuals going through the
14 egg retrieval and embryo creation process.

15 78. Egg retrieval, embryo creation, and cryopreservation services are costly. Customers pay
16 more than \$8,000 for a single cycle of egg retrieval, which includes clinical monitoring,
17 cryopreservation, and one year of storage. Additional cycles cost \$6,995 each. On its website, PFC
18 recommends storing more eggs than a woman typically produces in a single cycle. It is not uncommon
19 for women to undergo three or more egg retrieval cycles.

20 79. Embryo creation services are even costlier: PFC charges \$11,595 for basic IVF,
21 including clinical monitoring, egg retrieval, lab processing, and embryo transfer. If a customer chooses
22 to use Comprehensive Chromosome Screening to select the healthiest embryo to transfer, PFC’s basic
23 IVF cost rises to \$16,085.

24 80. After freezing, Plaintiffs and other customers paid approximately \$600 per year for
25 Prelude’s storage of their eggs or embryos.

26 81. The above amounts do not include the costs of in-person consultations (\$375 each
27 consultation), pre-cycle lab work, egg cryopreservation medications (\$2,000–\$6,000), embryo
28 transferring (\$2,845–\$4,460), and embryo transfer medications (\$300–\$600). Customers typically also

1 pay thousands of dollars for fertility drugs leading up to egg retrieval, and often spend hundreds of
2 dollars on acupuncture and other services recommended to improve outcomes. The entire process often
3 costs tens of thousands of dollars.

4 **B. The loss of eggs and embryos results in emotional distress, pain, and suffering.**

5 82. Prelude and PFC are aware of the lengths to which people go to obtain eggs and
6 embryos, how much these eggs and embryos mean to their customers, the customers' emotional (and
7 financial) investment in the survival of the eggs and embryos, and the customers' expectations that
8 great care will be taken to preserve and protect the eggs and embryos to avoid irreparable harm.

9 83. As women age, the quantity and quality of their eggs diminish. The most determinative
10 factor in IVF success is the woman's age when her eggs were extracted. At some point, usually around
11 her mid-40s, a woman can no longer produce viable eggs. Even if additional eggs can be retrieved, one
12 cannot replace 35-year-old eggs with 40-year-old eggs and expect the same result. When eggs and
13 embryos are damaged or compromised, it may be impossible for customers to have their own biological
14 children. There is no possibility of creating substitute embryos for cancer survivors or those whose
15 spouses have died. Likewise, those who used donor eggs or sperm to create embryos may find it
16 impossible to retrieve additional material from the same donors. Thus, donor-users who already have
17 children may be prevented from having additional children who are biologically related to their
18 siblings.

19 84. The success or failure of egg and embryo cryopreservation and storage services has
20 substantial emotional and psychological ramifications for those seeking to become parents. Losing eggs
21 or embryos results in severe emotional distress for the owner.

22 **C. Successful cryopreservation and storage depend on strict adherence to protocols.**

23 85. Eggs and embryos are fragile. They must be handled and stored carefully. Cooling,
24 storing, warming, and removing cryoprotectants must follow precise, controlled protocols. Failure to
25 adhere to these protocols can render the egg or embryo nonviable, impair implantation and viability,
26 and introduce chromosomal abnormalities.

27 86. A key goal of cryopreservation is to reduce cellular damage caused by the formation of
28 ice crystals and the expansion of water as cryopreserved material cools to subzero temperatures. PFC

1 states on its website that “[t]he key to successful egg freezing is determining a technique that will not
2 damage the fragile chromosomes of the egg”; this is because “the chromosomes of the egg are
3 vulnerable to damage, including damage from the exertion of the freezing and thawing process.”

4 87. As noted above, two primary cryopreservation technologies have emerged. Both rely
5 upon cryoprotectants, which are solutions added to the cells that reduce cell damage by displacing
6 water in a manner similar to antifreeze. The first technology, slow freezing (also known as slow
7 programmable freezing), utilizes specialized equipment that lowers the temperature of embryos
8 conditioned with cryoprotectants in a slow, controlled manner to -190°C . The second and newer
9 technology, vitrification, refers to any process resulting in “glass formation”—that is, transformation
10 from a liquid to a hardened liquid with minimal crystallization (ice crystals). According to PFC’s
11 website, vitrification “cools the cells in the embryo at rates close to 5,000 degrees per minute[,]” and
12 “embryos that are vitrified are exposed to 5-10 times more cryoprotectant than slow frozen embryos.”
13 The ultra-rapid nature of this process minimizes (1) the formation of ice crystals and (2) toxicity
14 damage to the cells that cryoprotectants can cause during longer exposure to warmer temperatures.

15 88. The process of warming eggs and embryos that have been preserved through
16 cryopreservation is similarly precise and dependent on specialized techniques and chemical solutions.
17 PFC describes the embryo warming process as follows on its website: “embryos coming out of the
18 freezer (at -196°C) are warmed to room temperature in a maximum of three seconds. This rapid
19 warming method minimizes damage to the embryo from ice crystals that can form during warming.” A
20 key part of the warming procedure is the precise dilution and eventual replacement of the toxic
21 cryoprotectant fluid with a solvent compatible with cytoplasmic fluid. PFC also states on its website
22 that it “incubat[es] the embryo in decreasing concentrations of the antifreeze, and increasing
23 concentrations of water. Over a period of 15 minutes, the embryo is stepped through 3 different
24 solutions, until finally the antifreeze is gone and all the water has been replaced.”

25 89. For slow-frozen tissue, the failure to thaw slowly can result in cells over-expanding,
26 rupturing, and dying. For vitrification, it is important to warm quickly to avoid ice formation. Thus, it is
27 critical that eggs or embryos cryopreserved through slow freezing be thawed slowly, and that tissue
28 cryopreserved through vitrification be warmed quickly in a carefully controlled manner. An

1 uncontrolled rise in temperature in a storage tank, like the one at issue here, can have catastrophic
2 consequences for eggs and embryos.

3 **III. Prelude Caused Irreparable Harm to Plaintiffs by Failing to Protect Their Eggs and**
4 **Embryos.**

5 90. On March 4, 2018, Prelude discovered a loss of a substantial amount of liquid nitrogen
6 in one of the cryogenic storage tanks located at PFC, Tank 4, manufactured by Chart. This incident
7 affected thousands of cryopreserved eggs and embryos belonging to more than 400 individuals and
8 families.

9 **A. Prelude should have had systems and processes in place to ensure that Plaintiffs’**
10 **eggs and embryos were not damaged.**

11 91. Liquid nitrogen in cryopreservation tanks evaporates at a slow rate. Absent extreme
12 circumstances, even when a leak occurs it should take days for a tank to warm enough to cause damage
13 to the enclosed eggs and embryos.

14 92. Egg and embryo storage facilities have developed and implemented a variety of systems
15 and processes to protect against liquid nitrogen levels dropping to levels low enough to endanger
16 customers’ eggs and embryos. These systems and processes include maintaining a functional controller
17 that constantly monitors temperature and liquid nitrogen levels, conducting regular inspections of the
18 tank and controller to verify controller functionality and accuracy, deploying multiple alarm systems
19 (both local and remote) that detect and send alerts of low liquid nitrogen levels, and installing
20 autofillers that detect and automatically replenish low liquid nitrogen levels.

21 93. On its website and in sales and marketing materials, PFC told its customers that the
22 storage facility located at its San Francisco headquarters was state of the art, containing tanks equipped
23 with around-the-clock monitoring, alarm systems, and response protocols, with further protection from
24 daily walk-throughs. But no alarms or phone alerts notified Prelude of the March 4 malfunction.
25 Instead, an unidentified Prelude employee discovered the problem while working in the lab. Staff then
26 transferred the eggs and embryos from Tank 4 to another tank.

27 94. Prelude lacked monitoring, alarm, and response systems and processes sufficient to
28 detect and prevent harm from a dangerous temperature rise in Tank 4. Prelude has not explained why

Tank 4 was not equipped with a controller that detected problems with the tank's temperature and liquid nitrogen level and consumption, why staff did not detect problems with Tank 4 during walk-throughs prior to March 4, or why Prelude did not have a functional autofilling mechanism on Tank 4 to replenish low liquid nitrogen levels.

95. Prelude (and in the first instance, PFC) further failed to mitigate the risk of loss of stored reproductive material by failing to store multiple eggs and embryos belonging to a single customer in separate vials and tanks.

96. *Wired* interviewed one laboratory director who opined that Prelude should have done just that:

"It's really quite sad the samples weren't split up," says Nahid Turan, who directs laboratory operations at the Coriell Institute for Medical Research, one of the oldest and largest biobanks in the US. "They were literally putting all the eggs in one basket." In addition to having samples in multiple tanks at their New Jersey facility, Coriell also has back-up sites in multiple locations around the country. And its software engineers built real-time monitoring systems to flag any tanks trending in a troubling direction *before* they fail.

97. Cryopreserved eggs and embryos belonging to many hundreds of other people were stored in the same tank as Plaintiffs' tissue. Tank 4 housed up to 15% of the total cryopreserved tissue located at PFC's San Francisco facility, consisting of thousands of eggs and embryos.

98. Most people with eggs and embryos stored in Tank 4 had all of their eggs and embryos stored in that single tank.

B. Chart recalled cryostorage tanks for vacuum seal defects after the Tank 4 incident.

99. On April 23, 2018, Chart, the manufacturer of Tank 4, recalled certain cryostorage tanks, stating in its recall notice: "Chart is presently investigating the possible cause of the **VACUUM LEAK AND/OR FAILURE** which may be due to inadequate adhesion of the composite neck to the aluminum unit" (emphasis in original). Chart added that the "issue appears to be an isolated occurrence involving the machine and binding agent used during the manufacturing process."

100. Chart announced the recall four days after PFC's April 19 email to its customers revealed the conclusion of "independent experts" that the March 4 incident "likely involved a failure of the tank's vacuum seal."

C. Multiple investigations were opened after the Tank 4 incident.

101. Various government entities and trade groups have responded to the March 4, 2018 incident. The College of American Pathologists (CAP) is conducting a formal investigation into the incident, as is the California Department of Public Health. The American Society for Reproductive Medicine also is studying the incident and has stated that it intends to make recommendations to its members based on its findings.

D. Prelude's failure to keep Plaintiffs' eggs and embryos safe and secure has resulted in harm.

102. As a result of Prelude's deficient performance of their storage duties, Plaintiffs have suffered serious, lifelong harm and lost the family planning flexibility that caused them to cryopreserve their eggs and embryos in the first place.

103. Prelude has refused to share publicly the data it has collected regarding the number of Tank 4 eggs and embryos that have been thawed or the resulting outcomes. The survival rate for these eggs and embryos is *far* lower than it would have been had the incident not occurred.

104. PFC has taken the position that the embryos in Tank 4 must be fully thawed to determine whether they remain viable after the incident. PFC also asserts that the eggs in Tank 4 must be fully thawed and fertilized to determine whether they remain viable after the incident. Because of the risks associated with re-freezing embryos, a family must be prepared before thawing to transfer the embryo into a woman's uterus and attempt a pregnancy if the embryo is deemed viable.

105. Many of those affected by the Tank 4 incident have attempted to thaw their eggs or embryos, only to confirm that their eggs or embryos are no longer viable. Many families and individuals have lost their best or only chance of having a child. Those who can undergo additional retrievals face a greater risk that those eggs or embryos will not lead to a successful pregnancy, as the age at which a woman's eggs are retrieved is the dominant factor for rates of success or failure.

106. Neither PFC nor Prelude has provided a comprehensive analysis of the risks of attempting a pregnancy with any of the tissue from Tank 4, including the risks that the drop in liquid nitrogen levels may have caused chromosomal or other defects undetectable from a thaw. In fact, after

1 the Tank 4 incident, PFC has told its customers that pregnancies derived from material stored in Tank 4
2 may face “unknown” risks.

3 107. Nevertheless, PFC has advised Plaintiffs with affected eggs and embryos to attempt
4 pregnancies with Tank 4 tissue. Before undergoing an embryo or egg thaw, embryo transfer, or egg
5 fertilization, PFC requires customers to sign a consent statement acknowledging that the risks are
6 uncertain and waiving any liability on the part of PFC arising out of the thaw, transfer, or fertilization
7 procedure.

8 108. Thus, as a result of the Tank 4 incident, Plaintiffs are being asked to make consequential
9 reproductive decisions immediately—depriving them of the freedom and flexibility they sought when
10 they decided to store their frozen eggs and embryos. To determine whether their tissue remains viable,
11 PFC has counseled those affected by the incident to thaw and immediately fertilize eggs, and to transfer
12 embryos to a woman’s uterus. Yet the purpose of cryopreservation was to allow these customers to
13 make reproductive choices on their own timelines. Many customers do not yet have a partner with
14 whom they wish to fertilize their eggs, or are not ready to move forward with a sperm donor, much less
15 try to get pregnant now or arrange for a surrogate. Others were busy with their careers and other
16 commitments when the incident occurred, making it inconvenient or impossible to attempt a pregnancy
17 right away.

18 109. People affected by the March 4 incident have described being thrust into a state of
19 limbo, as the “insurance policy” they paid for has vanished. To restore their future fertility options,
20 some are attempting additional retrieval cycles at an older age, with lower-quality eggs, and at
21 considerable cost, burden, and disruption to their lives. These additional retrieval cycles also involve
22 medical risks and potential complications. Many class members completed these cycles only to learn
23 they were incapable of producing sufficient, or any, viable eggs or embryos. Other class members, for
24 whom additional retrievals are not possible or recommended, fear that they will remain childless.

25 110. The National Infertility Association recognized the negative impact of the March 4
26 incident on women and families, stating that it was “shocked” to hear of this “unprecedented traged[y]”
27 for “the entire family building community. Our hearts break for each person impacted. We know first-
28

1 hand what someone goes through to have eggs or embryos to freeze, and to have this outcome is
2 devastating for everyone.”

3 111. The Tank 4 incident has exacted an enormous emotional toll on Plaintiffs, who are
4 distraught.

5 112. Given the sensitive nature of the eggs and embryos entrusted to their care, as well as
6 their familiarity with the deeply emotional aspects of their services, PFC and Prelude were aware of the
7 substantial adverse consequences for PFC’s customers that would result from a failure to keep their
8 eggs and embryos safe and secure.

9 **E. PFC’s communications regarding the incident have compounded the harm.**

10 113. PFC first attempted to notify its customers of the March 4 incident a week after it
11 occurred.

12 114. At approximately 4:00 a.m. Pacific time on March 11, 2018, PFC sent its customers an
13 email stating:

14 Earlier this week, a single piece of equipment lost liquid nitrogen for a brief
15 period of time. The remainder of the equipment and cryo-storage facility was
16 not affected. As soon as the issue was discovered, our most senior
17 embryologists took immediate action to secure all tissue in that single cryo-
18 storage tank. The tank was immediately retired, and the facility is operating
19 securely.

20 We have hired independent experts and launched an in-depth investigation of
21 the matter. We felt it was imperative to advise you that your tissue was stored
22 in the affected tank and *may* have been impacted. Based on our preliminary
23 analysis, the good news is that we do expect that some of the tissue from that
24 tank remains viable. We are continuing to gather information but wanted to
25 share these developments with you directly.

26 115. The email further stated, “[w]e are incredibly sorry that this happened and for the
27 anxiety that this will surely cause. We are heartbroken by this situation and our thoughts are with each
28 of you who may have been touched by this event.”

116. The email invited Plaintiffs and other families with eggs and embryos stored in Tank 4
to call to discuss the incident with their fertility specialists. The call center was overwhelmed for

1 weeks, and the information provided over the phone and in person has been vague and often
2 inconsistent. Different PFC staff members have provided customers with conflicting information.

3 117. PFC did not provide further written information until over a month later, on April 19,
4 2018, when it wrote to its customers with “several updates following the tank failure that occurred in
5 the embryology lab on March 4, 2018.”

6 118. PFC wrote that “independent experts have been investigating the incident” and
7 preliminarily determined that it “likely involved a failure of the tank’s vacuum seal.”

8 119. PFC did not—in either its initial March 11 communication or its April 19 follow up—
9 disclose to Plaintiffs, or to anyone else with tissue stored at its facility, [REDACTED]
10 [REDACTED]

11 120. PFC’s public messages have exacerbated Plaintiffs’ pain and confusion. On March 11,
12 2018, a PFC employee told ABC News that a large number of families with eggs and embryos stored at
13 the facility were “people who won’t use them anyway.” Other customers with eggs and embryos in
14 Tank 4 were billed for storage fees after the incident occurred and before it was disclosed to them.

15 121. While PFC has offered some of its customers a free additional cycle for egg retrieval,
16 such a remedy is not adequate to compensate for the incident. Older women are generally not able to
17 produce eggs of as high a quality as when they were younger, and in many cases go through the entire
18 process only to learn they are unable to produce any viable eggs. Even where some eggs can be
19 retrieved, women confront a greater risk that those eggs will not lead to a successful transfer and
20 pregnancy. Moreover, additional retrievals are time consuming, expensive, physically painful, and
21 emotionally exhausting, and typically require time away from work. Even two or three cycles may not
22 fully replenish the number of viable eggs that were lost.

23 122. PFC’s April 19, 2018 email blaming the incident on a failure of Tank 4’s vacuum seal
24 left Plaintiffs with more questions than answers. PFC did not say why it failed to detect the incident
25 until it was too late to prevent harm to Plaintiffs’ eggs and embryos. Plaintiffs were not told why no
26 alarm alerted storage staff, why a backup system (*e.g.*, an autofill function or additional generator) did
27 not engage, or why the problem went undiscovered until March 4.

123. PFC states on its website that tanks can go without power or liquid nitrogen for “several days” without compromising the enclosed reproductive tissue. It is unclear why Prelude failed to detect the problem with Tank 4 until it was too late.

124. PFC’s April 19 email also stated that it “can report several early pregnancies” from thawed and transferred embryos, and that it had “successfully thawed a limited number of eggs[,] confirm[ing] that there is viable tissue from the tank.” PFC did not disclose to its customers, however, that much of the tissue in the tank is *unviable*. Nor did PFC provide a comparison of the survival rate of affected tissue to the survival rate of eggs and embryos under normal circumstances. PFC still has not publicly provided this information. Instead, PFC notified all people with tissue in Tank 4, including Plaintiffs, that their eggs and embryos might be “viable” despite knowing this was *not* true for many or most of these people.

125. PFC’s failure to communicate clearly and consistently with victims of the Tank 4 incident has compounded the harm caused by the incident.

PLAINTIFF-SPECIFIC ALLEGATIONS

Plaintiffs A.B. and C.D.

126. Plaintiffs A.B. and C.D. first contacted PFC in or around May 2013 about the possibility of creating embryos and having their embryos frozen.

127. In July 2013 Plaintiffs A.B. and C.D. hired PFC to create and preserve their embryos for future use.

128. Before freezing their embryos at PFC, Plaintiffs A.B. and C.D. conducted extensive research concerning IVF and fertility centers and chose PFC based on the belief that it provided high-quality services that were state of the art. Before having their embryos cryopreserved with PFC, Plaintiffs A.B. and C.D. saw representations about PFC’s services on its website, including PFC’s claims that it provided high-quality services. Plaintiffs A.B. and C.D. also had both phone and in-person consultation sessions with Dr. Eldon Shriock in May and June 2013. During these sessions, Dr. Shriock told Plaintiffs A.B. and C.D. about PFC’s care, professionalism, and state-of-the-art facilities.

129. Over the course of the summer of 2013, Plaintiffs A.B. and C.D. underwent procedures to prepare for embryo creation and cryopreservation.

Plaintiff E.F.

136. Plaintiff E.F. first contacted PFC in or around May 2016 about the possibility of having her eggs frozen.

137. In or around June 2016, Plaintiff E.F. hired PFC to retrieve and preserve her eggs for future use.

138. Before having her eggs frozen with PFC, Plaintiff E.F. saw representations about PFC's services on its website, including claims regarding the qualifications of PFC's staff and the science behind the clinic's procedures. Plaintiff E.F. also met with Dr. Carolyn Givens, who told her about PFC's use of cutting-edge technology and assured her that her eggs would be there for as long as she needed them.

141. Prelude kept Plaintiff E.F.’s eggs within a metal storage tank—Tank 4—at PFC’s San Francisco facility. Rather than mitigating the risk of tank failure by spreading Plaintiff E.F.’s eggs among several tanks, Prelude stored all of her eggs in the same tank.

143. Plaintiff G.H. first contacted PFC in or around February 2016 about the possibility of having her eggs frozen.

145. Before having her eggs frozen with PFC, Plaintiff G.H. saw representations about PFC's services on its website, including claims about the quality of its services. Plaintiff G.H. also met with Dr. Carolyn Givens, who provided information regarding PFC's services.

147. At the time of the Tank 4 incident, Plaintiff G.H.'s eggs were under

148. Prelude kept Plaintiff G.H.'s eggs within a metal storage tank—Tank 4—at PFC's San Francisco facility. Rather than mitigating the risk of tank failure by spreading Plaintiff G.H.'s eggs among several tanks, Prelude stored all of her eggs in the same tank.

Plaintiff K.L.

157. Plaintiff K.L. first contacted PFC on or around June 3, 2010, about the possibility of having her eggs cryopreserved.

158. In or around December 2015, Plaintiff K.L. hired PFC to retrieve and preserve her eggs for future use.

159. Before having her eggs frozen with PFC, Plaintiff K.L. saw representations about PFC's services on its website, including PFC's claims that the clinic and its services were safe and reliable, and that eggs could be stored until the right time for the customer. Plaintiff K.L. also saw PFC's representations that the process was quick and easy for customers and had a very high likelihood of success. In addition, Plaintiff K.L. met with Dr. Eldon Schriock, who told her that storage at PFC was safe.

160. In February 2016, Plaintiff K.L. underwent procedures to prepare for egg retrieval and freezing. Before the retrieval procedure, she went through months of treatment and injections. She also had to take several days off from work and could not travel for work for two weeks. PFC ultimately retrieved and froze five of her eggs.

161. At the time of the Tank 4 incident, Plaintiff K.L.'s eggs were under [REDACTED]

162. Prelude kept Plaintiff K.L.'s eggs from her first cycle within a metal storage tank—Tank 4—at PFC's San Francisco facility. Rather than mitigating the risk of tank failure by spreading Plaintiff K.L.'s eggs from that cycle among several tanks, Prelude stored all of her eggs in the same tank.

163. Plaintiff K.L. has paid approximately \$12,000 to PFC and Prelude for procedures, medications, and storage of her eggs. She experienced severe emotional distress when she learned of the March 4, 2018 incident and in the months that have followed.

Plaintiffs M.N. and O.P.

164. Plaintiff M.N. first contacted PFC in or around September 2011 about the possibility of having her eggs frozen.

165. In or around late 2011, Plaintiff M.N. hired PFC to retrieve and preserve her eggs for future use.

1 protect Plaintiffs' eggs and embryos, PFC and Prelude did not accurately disclose the nature and details
2 of their tissue storage operation to Plaintiffs.

3 174. Had either or both PFC and Prelude disclosed [REDACTED]
4 [REDACTED] or that the Prelude's storage monitoring and alarm systems and other
5 processes were deficient, nonfunctional, or incapable of protecting their eggs and embryos in the event
6 of a tank failure, Plaintiffs would not have purchased or continued using the egg and embryo storage
7 services.

8 CLASS ACTION ALLEGATIONS

9 175. Plaintiffs propose certification of the following class, pursuant to Rules 23(a), (b)(2),
10 and (b)(3) of the Federal Rules of Civil Procedure:

11 All individuals, and their reproductive partners, who had eggs, embryos, or
12 other material in Tank 4 at Pacific Fertility Center in San Francisco, California
13 on March 4, 2018.

14 Excluded from this class are Defendants, their affiliates and subsidiaries, and their officers, directors,
15 partners, employees, and agents; class counsel, employees of class counsel's firms, and class counsel's
16 immediate family members; defense counsel, their employees, and their immediate family members;
17 and any judicial officer who considers or renders a decision or ruling in this case, their staff, and their
18 immediate family members.

19 176. Numerosity. The members of the class are so numerous that their individual joinder is
20 impracticable. There are more than 400 class members, whose names and addresses are readily
21 available from PFC's records.

22 177. Existence and Predominance of Common Questions of Fact and Law. Class certification
23 is appropriate under Rule 23(b)(3) because this action involves common questions of law and fact that
24 predominate over any questions affecting individual class members, including, without limitation:

25 a. Whether Tank 4 was defective, including due to Chart's manufacturing or design
26 of the tank;

27 b. Whether Prelude owed a duty to Plaintiffs and class members to protect the eggs
28 and embryos under its care;

c. Whether the March 4, 2018 loss of liquid nitrogen in Tank 4 resulted from Prelude's negligence or other wrongful conduct;

d. Whether Prelude failed to take adequate and reasonable measures to ensure that its systems were protected;

e. Whether Prelude failed to take available steps to ensure that liquid nitrogen levels in its storage tanks would remain sufficient;

f. Whether Prelude breached its duties to protect the eggs and embryos that Plaintiffs and class members entrusted to its care;

g. Whether PFC and Prelude fraudulently concealed material information regarding egg and embryo storage, practices, and procedures;

h. The type(s) and measure(s) of compensable and other redressable injury incurred by Plaintiffs and class members as a result of Defendants' conduct alleged herein; and

i. What measures are necessary to ensure that eggs and embryos stored at PFC are properly safeguarded in the future.

178. Typicality. Plaintiffs' claims are typical of the other class members' claims because Plaintiffs and class members were subjected to the same wrongful conduct and damaged in the same way by having their eggs and embryos compromised.

179. Adequacy of Representation. Plaintiffs are adequate class representatives. Their interests do not conflict with the interests of the other class members they seek to represent. Plaintiffs have retained counsel competent and experienced in complex class action litigation, as well as in matters concerning egg and embryo loss, who will prosecute this action vigorously. Plaintiffs and their counsel will fairly and adequately pursue and protect the interests of the class.

180. Superiority. A class action is superior to all other available means for the fair and efficient adjudication of this controversy. The sensitive, private nature of the facts involved here, as well as the fear that bringing an individual suit could affect future treatment at PFC, favors providing a class vehicle to adjudicate these claims. The damages or other financial detriment suffered by Plaintiffs and the other class members are relatively small compared to the burden and expense that would be

required to individually litigate these claims. As a result, it would be impracticable for class members to seek redress individually. Individualized litigation would also create a potential for inconsistent or contradictory judgments and increase the delay and expense to all parties and the court system. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

181. Class certification is also appropriate under Rule 23(b)(2) because Defendants acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the members of the class as a whole.

182. The claims of class members include common issues whose efficient adjudication in a class proceeding would materially advance the litigation and aid in achieving judicial economy and efficiency. Hence, in the alternative, class certification under Rule 23(c)(4) may be appropriate as to certain issues.

CLAIMS FOR RELIEF

183. Plaintiffs bring each of the following claims under California law.

184. None of Plaintiffs' claims involves any allegation of medical malpractice.

FIRST CAUSE OF ACTION **Negligence and/or Gross Negligence** **(Against Prelude and Pacific MSO)¹**

185. Plaintiffs incorporate the above and below allegations by reference.

186. This is not a claim for professional negligence. Neither Prelude nor Pacific MSO is a health care provider. At no relevant time has Prelude been licensed or certified to provide medical services. In September 2017, concurrently with the PFC transaction, Pacific MSO amended its articles of incorporation to make clear that it was not engaged in the practice of medicine; thus, like Prelude, Pacific MSO has at no relevant time been licensed or certified to provide medical services.

187. Given the special relationship arising from the sensitive services they undertook to perform—storage of human egg and embryos—Prelude and Pacific MSO owed Plaintiffs a duty to

¹ For the sake of clarity, Prelude and Pacific MSO are referred to separately hereinafter.

1 exercise reasonable care in all aspects of the storage of Plaintiffs' eggs and embryos so as to avoid
2 destroying them, damaging them, or jeopardizing their viability given that doing so would inevitably
3 lead to emotional distress. Egg and embryo storage services are intertwined with Plaintiffs' most vital
4 concerns, such as comfort, happiness, and personal welfare.

5 188. Prelude and Pacific MSO also owed a duty to Plaintiffs because [REDACTED]
6 [REDACTED]. Such services were of a kind that
7 Prelude and Pacific MSO should have recognized and did recognize as needing to be performed with
8 reasonable care for the protection of Plaintiffs' emotional tranquility and peace of mind.

9 189. Plaintiffs' harms occurred in the course of specified categories of activities,
10 undertakings, or relationships in which negligent actions and negligent failures to act were especially
11 likely to cause serious harm.

12 190. It was reasonably foreseeable to Prelude and Pacific MSO that Plaintiffs would
13 experience severe emotional distress as a result of any breach of their duty of reasonable care.

14 191. Recognition that Prelude and Pacific MSO have a duty to avoid causing emotional
15 distress and other harm will promote the policy of preventing future harm, by motivating Prelude and
16 Pacific MSO to implement processes and systems reasonably likely to safeguard the eggs and embryos
17 entrusted to them going forward. This duty also furthers the community's interest in ensuring that
18 reliable long-term egg and embryo freezer storage services are available to those who wish to become
19 parents one day in the future.

20 192. The burden on Prelude and Pacific MSO from a duty to avoid causing emotional distress
21 is fair and appropriate, in light of the importance of the eggs and embryos they voluntarily agreed to
22 store and protect, at considerable cost to Plaintiffs.

23 193. As detailed above, Prelude and Pacific MSO took actions that a reasonably careful
24 person would not have taken in the same situation and also failed to take actions that a reasonably
25 careful person would have taken in the same situation. Prelude and Pacific MSO therefore breached
26 their duty to exercise reasonable care in the storage of Plaintiffs' eggs and embryos.
27
28

1 194. Prelude and Pacific MSO's acts and omissions constitute gross negligence, because they
2 constitute a total lack of care and an extreme departure from what a reasonably careful person would do
3 in the same situation to prevent foreseeable loss of eggs and embryos.

4 195. Prelude and Pacific MSO's carelessness and negligence directly and foreseeably
5 damaged Plaintiffs. Prelude and Pacific MSO's mishandling of Plaintiffs' eggs and embryos naturally
6 and foreseeably caused mental anguish and serious emotional distress, among other injuries, to
7 Plaintiffs.

8 196. There is a very close connection between Prelude and Pacific MSO's conduct and
9 Plaintiffs' injuries. Plaintiffs' emotional distress and other harms occurred because of Prelude and
10 Pacific MSO's failure to act reasonably in all aspects of the storage of Plaintiffs' eggs and embryos.

11 197. Plaintiffs trusted that those responsible for storing their eggs and embryos would use
12 reasonable care to safeguard them. Prelude and Pacific MSO's carelessness with this precious material,
13 and ultimately, with Plaintiffs' careful plans for parenthood, amounts to despicable conduct.

14 198. Prelude and Pacific MSO acted, and failed to act, willfully and with conscious and
15 reckless disregard for the rights and interests of Plaintiffs. Prelude and Pacific MSO's acts and
16 omissions had a great probability of causing significant harm and in fact caused such harm.

17 199. Prelude and Pacific MSO's failure to use reasonable care in handling and safeguarding
18 Plaintiffs' eggs and embryos was a substantial factor in causing Plaintiffs' harm.

19 200. Prelude and Pacific MSO's negligence was a substantial factor in causing Plaintiffs
20 severe emotional distress, regardless of whether it is ever determined conclusively that the eggs and
21 embryos in Tank 4 are no longer viable. Prelude and Pacific MSO's misconduct has irreparably
22 breached trust and caused uncertainty, anxiety, and fear among Plaintiffs and other affected families
23 over how to proceed without being informed as to the long-term effects from an egg or embryo's
24 presence in Tank 4 during the incident.

25 201. As a direct and proximate result of Prelude and Pacific MSO's negligence, Plaintiffs
26 suffered harm in an amount to be determined at trial, including serious emotional distress consisting of
27 worry, shock, fright, horror, anguish, suffering, grief, anxiety, nervousness, embarrassment,
28

humiliation, and shame. A reasonable person would be unable to cope with the losses suffered by Plaintiffs.

SECOND CAUSE OF ACTION
Negligent Failure to Recall
(Against Chart)

202. Plaintiffs incorporate the above and below allegations by reference.

203. Chart acted negligently by failing to recall, prior to the incident of March 4, 2018, the line of tanks that included Tank 4.

204. Chart designed, manufactured, assembled, produced, distributed, and/or sold this line of tanks.

205. Chart knew or reasonably should have known that, when used as intended, Tank 4 presented or was likely to present a danger to eggs and embryos. Chart knew or reasonably should have known that the vacuum seal on Tank 4 was vulnerable to breach, and that upon such breach liquid nitrogen levels would drop, causing the eggs and embryos stored inside the tank to reach dangerously elevated temperatures.

206. After Chart sold Tank 4 to PFC and before March 4, 2018, Chart knew or reasonably should have known that the tank's vacuum seal was susceptible to breaking. Nevertheless, at no point during this time period did Chart recall, repair, or warn of the danger posed by the tank.

207. A reasonable designer, manufacturer, distributor, or seller facing the same or similar circumstances as Chart, in the exercise of reasonable care, would have recalled Tank 4 to ensure eggs and embryos were not endangered.

208. Chart's failure to timely recall Tank 4 was a substantial factor in causing harm to Plaintiffs. Had Chart recalled Tank 4 before the incident, the other Defendants would not have used it, and it would not have failed while Plaintiffs' eggs were stored within it.

THIRD CAUSE OF ACTION
Bailment
(Against Prelude and Pacific MSO)

209. Plaintiffs incorporate the above and below allegations by reference.

210. A bailment arises where possession, but not ownership, of property is transferred from one party, a bailor, to another, a bailee. Where the personal property of a bailor is delivered to a bailee, a duty of care is owed.

211. Prelude and Pacific MSO received for safekeeping Plaintiffs' irreplaceable personal property to be safely and securely kept for the benefit of Plaintiffs, and to be redelivered to them upon demand.

212. Plaintiffs agreed to pay, and did pay, substantial sums in exchange for the safekeeping of their eggs and embryos.

213. Prelude and Pacific MSO had a duty to exercise care in maintaining, preserving, and protecting Plaintiffs' eggs and embryos. Further, Prelude and Pacific MSO had a duty to return the eggs and embryos, undamaged, to Plaintiffs.

214. Because of Prelude and Pacific MSO's wrongful conduct, as set forth herein, the irreplaceable property of Plaintiffs was irreparably damaged, precluding its redelivery to them.

215. Prelude and Pacific MSO breached their duties to exercise care in the safekeeping of Plaintiffs' eggs and embryos and to return the eggs and embryos, undamaged, to Plaintiffs.

216. As a direct and proximate result of Prelude and Pacific MSO's breach of the foregoing duties, Plaintiffs have been deprived of the opportunity to use their eggs and embryos, and have suffered damages in an amount to be determined at trial.

FOURTH CAUSE OF ACTION
Premises Liability
(Against Prelude and Pacific MSO)

217. Plaintiffs incorporate the above and below allegations by reference.

218. At all relevant times, Prelude and Pacific MSO owned, leased, and/or occupied the property, premises, machinery, and equipment, including Tank 4, on the premises at 55 Francisco Street, Suite 500, San Francisco, California 94133.

219. At all relevant times, Prelude and Pacific MSO had a duty to exercise reasonable care to keep Plaintiffs' eggs and embryos in a reasonably safe condition and free from injury or harm.

220. At all relevant times, Prelude and Pacific MSO knew, or by reasonable inspection and monitoring should have known, of the defective condition of the premises, and specifically of Tank 4 and its accompanying equipment.

221. At all relevant times, Prelude and Pacific MSO were careless and negligent in the ownership, management, control, and maintenance of the aforementioned real property, such that Plaintiffs, whose cryopreserved eggs were under Prelude and Pacific MSO's care, were harmed.

222. By reason of the foregoing, and as a direct and legal cause thereof, Plaintiffs have suffered injury, loss, harm, and damages.

FIFTH CAUSE OF ACTION

Violations of the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.* (Against Prelude, Pacific MSO, Chart, and PFC)

223. Plaintiffs incorporate the above and below allegations by reference.

224. The UCL prohibits acts of "unfair competition," including any "unlawful, unfair or fraudulent business act or practice."

Unlawful

225. This claim is asserted against PFC, Prelude, and Pacific MSO. PFC, Prelude, and Pacific MSO's conduct is unlawful in violation of the UCL, because—as set forth below in the Sixth Cause of Action—it violates the California Consumers Legal Remedies Act.

Unfair

226. This claim is asserted against Defendants Prelude, Pacific MSO, and Chart.

227. Prelude, Pacific MSO, and Chart's conduct is unfair because it is immoral, unethical, unscrupulous, oppressive, and substantially injurious.

228. Prelude and Pacific MSO voluntarily took responsibility for safeguarding Plaintiffs' eggs and embryos through long-term freezer storage in order to preserve Plaintiffs' options for procreation, parenting, or assisting others experiencing infertility. Prelude and Pacific MSO breached that trust and acted in an unethical, unscrupulous, outrageous, oppressive, and substantially injurious manner by, among other things:

a. failing to adequately maintain, inspect, monitor, and test the liquid nitrogen freezer tanks, including through a functional electronic tank monitoring system capable of detecting a rise in temperature or a drop in liquid nitrogen levels and promptly alerting staff to the immediate problem;

b. permitting a leakage or tank failure to occur with respect to one of their liquid nitrogen storage tanks—Tank 4—containing human eggs and embryos;

c. failing to adequately inspect Tank 4 on a regular basis;

d. failing to establish, maintain, and properly activate alarms;

e. failing to establish, maintain, and properly activate backup redundancies;

f. failing to establish, maintain, and properly activate the controller and/or autofill devices; and

g. failing to properly safeguard the eggs and embryos in their care, including by implementing and abiding by appropriate protocols and procedures.

229. Chart acted unfairly, in an unethical, unscrupulous, outrageous, oppressive, and substantially injurious manner, by, among other things:

a. failing to adequately design Tank 4 to avoid catastrophic failure resulting in damage to or destruction of frozen reproductive materials, including eggs or embryos;

b. failing to adequately manufacture Tank 4 to avoid catastrophic failure resulting in damage to or destruction of frozen reproductive materials, including eggs or embryos;

c. failing to adequately warn users concerning the risks presented by Tank 4; and

d. failing to recall, prior to the Tank 4 incident, the line of tanks that included Tank 4.

230. As a direct and proximate result of Prelude, Pacific MSO, and Chart's unfair conduct violative of the UCL, Plaintiffs have suffered injuries in fact and lost money or property, and they seek appropriate relief under the UCL, including injunctive relief and restitution.

231. The gravity of the harm resulting from Prelude, Pacific MSO, and Chart's conduct far outweighs any conceivable utility of this conduct. There are reasonably available alternatives that would further Prelude, Pacific MSO, and Chart's legitimate business interests, such as implementing

adequate design, testing, manufacturing, warning, and recall protocols, and implementing reasonable protocols and procedures to prevent catastrophic failure.

232. Plaintiffs could not have reasonably avoided injury from Prelude, Pacific MSO, and Chart's unfair conduct. Plaintiffs did not know, and had no reasonable means of learning, that Prelude and Pacific MSO [REDACTED], let alone that they were not properly safeguarding the eggs and embryos [REDACTED]. Nor did Plaintiffs have occasion to know that Chart had supplied and failed to recall a defective storage tank.

Fraudulent

233. This claim is asserted against PFC, Prelude, and Pacific MSO. PFC, Prelude, and Pacific MSO's conduct is fraudulent in violation of the UCL because it was likely to mislead a reasonable consumer, in at least the following respects:

a. When offering to provide long-term freezer storage services to Plaintiffs and class members, PFC knowingly and intentionally failed to disclose and actively concealed that it did not have reasonable processes and systems in place to safeguard Plaintiffs' and class members' eggs and embryos;

b. PFC also knowingly and intentionally failed to disclose and actively concealed that it had [REDACTED]; and

c. Prelude and Pacific MSO knowingly and intentionally failed to disclose and actively concealed: (1) that they [REDACTED] had no license, and had no medical personnel on staff; and (2) that their systems and processes in place to safeguard the eggs and embryos were inadequate.

234. PFC had ample means and opportunities to alert Plaintiffs and class members at the outset to the fact that it was not employing reasonable processes and systems to safeguard Plaintiffs' eggs and embryos. Later, PFC also had the means and opportunity to alert Plaintiffs and class members to the fact that [REDACTED].

235. Prelude and Pacific MSO also had opportunities to disclose these facts to Plaintiffs, including through their employees, who consulted with customers concerning their tissue.

1 236. Despite these opportunities, PFC, Prelude, and Pacific MSO all independently failed to
2 disclose the above information to Plaintiffs and the other members of the class. Had Defendants made
3 those disclosures, Plaintiffs would not have purchased, or continued purchasing, the long-term freezer
4 storage services at issue.

5 237. PFC had a duty to accurately disclose who was responsible for tissue storage, and to
6 warn of the inadequacies in its tissue storage systems and processes, because it made partial
7 representations concerning the egg and embryo storage operation in place at its facility. PFC
8 volunteered specific information to Plaintiffs through advertising, on its website, and in documents that
9 its storage services were high quality and reliable, including representations that a tank could go
10 without power or liquid nitrogen for “several days” without damaging the tissue it contained. PFC also
11 had exclusive and superior knowledge of the relevant facts, compared to Plaintiffs and class members,
12 yet actively concealed the information rather than disclosing it.

13 238. Prelude and Pacific MSO were under a duty to disclose both [REDACTED]
14 [REDACTED], and that their storage systems and processes were inadequate, given their exclusive
15 knowledge of these matters. Yet they actively concealed the information rather than disclosing it.

16 239. As a direct and proximate result of PFC, Prelude, and Pacific MSO’s fraudulent conduct
17 violative of the UCL, Plaintiffs have suffered injuries in fact and lost money or property, and they seek
18 appropriate relief under the UCL, including injunctive relief and restitution.

19 240. Had PFC, Prelude, and Pacific MSO not made misleading statements and omissions
20 regarding the control over, and the adequacy of, the relevant equipment, systems, and processes,
21 Plaintiffs would not have purchased and continued purchasing the storage services. In the meantime,
22 PFC, Prelude, and Pacific MSO generated more revenue than they otherwise would have, unjustly
23 enriching themselves.

24 241. Plaintiffs were harmed, and PFC, Prelude, and Pacific MSO’s misleading statements and
25 omissions were a substantial factor in causing Plaintiffs’ harm.

26 242. The requested injunction under the UCL will primarily benefit the interests of the
27 general public. It will have the primary purpose and effect of prohibiting unlawful action and inaction
28

that threatens injury to members of the public who have placed, or who in the future place, reproductive tissue under Prelude or Pacific MSO's care or in one of Chart's tanks.

SIXTH CAUSE OF ACTION

Violations of the Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* (Against PFC, Prelude, and Pacific MSO)

243. Plaintiffs incorporate the above and below allegations by reference.

244. PFC, Prelude, and Pacific MSO is each a "person" as defined by Civil Code §§ 1761(c) and 1770 and have provided "services" as defined by Civil Code §§ 1761(b) and 1770.

245. Plaintiffs are "consumers" as defined by Civil Code §§ 1761(d) and 1770 and have engaged in "transaction[s]" as defined by Civil Code §§ 1761(e) and 1770.

246. PFC, Prelude, and Pacific MSO's acts and practices were intended to and did result in the continued sale of services to Plaintiffs, and those acts and practices violated Civil Code § 1770, including by:

- a. passing off services as those of another;
- b. misrepresenting the source of goods or services;
- c. misrepresenting the affiliation, connection, or association with another;
- d. representing that their services had characteristics, uses, and benefits that they did not have;
- e. representing that their services were of a particular standard, quality, or grade, when they were not;
- f. advertising services with intent not to sell them as advertised; and
- g. representing that the subject of a transaction had been supplied in accordance with a previous representation when it had not.

247. PFC, Prelude, and Pacific MSO's acts and practices violated the Consumers Legal Remedies Act because each of these Defendants failed to disclose information that was material to Plaintiffs' relevant transactions. For example:

- a. When offering to provide long-term freezer storage services to Plaintiffs and class members, PFC knowingly and intentionally failed to disclose and actively concealed that it did

1 not have reasonable processes and systems in place to safeguard Plaintiffs' and class members' eggs
2 and embryos;

3 b. PFC also knowingly and intentionally failed to disclose and actively concealed
4 that it had [REDACTED]
5 [REDACTED]; and

6 c. Prelude and Pacific MSO knowingly and intentionally failed to disclose and
7 actively concealed: (1) that [REDACTED]
8 [REDACTED] had no license, and had no medical personnel on staff; and (2) that their systems and
9 processes in place to safeguard the eggs and embryos were inadequate.

10 248. PFC had ample means and opportunities to alert Plaintiffs and class members at the
11 outset to the fact that it was not employing reasonable processes and systems to safeguard Plaintiffs'
12 eggs and embryos. Later, PFC also had the means and opportunity to alert Plaintiffs and class members
13 to the fact that [REDACTED].

14 249. Prelude and Pacific MSO also had opportunities to disclose these facts to Plaintiffs,
15 including through their employees, who consulted with customers concerning their tissue.

16 250. Despite these opportunities, PFC, Prelude, and Pacific MSO all independently failed to
17 disclose the above information to Plaintiffs and the other members of the class. Had Defendants made
18 those disclosures, Plaintiffs would not have purchased, or continued purchasing, the long-term freezer
19 storage services at issue.

20 251. PFC had a duty to accurately disclose who was responsible for tissue storage, and to
21 warn of the inadequacies in its tissue storage systems and processes, because it made partial
22 representations concerning the egg and embryo storage operation in place at its facility. PFC
23 volunteered specific information to Plaintiffs through advertising, on its website, and in documents that
24 its storage services were high quality and reliable, including representations that a tank could go
25 without power or liquid nitrogen for "several days" without damaging the tissue it contained. PFC also
26 had exclusive and superior knowledge of the relevant facts, compared to Plaintiffs and class members,
27 yet actively concealed the information rather than disclosing it.

1 252. Prelude and Pacific MSO were under a duty to disclose both [REDACTED]
2 [REDACTED] and that their storage systems and processes were inadequate, given their exclusive
3 knowledge of these matters. Yet they actively concealed the information rather than disclosing it.

4 253. As a direct and proximate result of PFC, Prelude, and Pacific MSO's deceptive acts and
5 practices in violation of the Consumers Legal Remedies Act, Plaintiffs have suffered actual damages.
6 Had PFC, Prelude, and Pacific MSO not made misleading statements and omissions regarding the
7 control over, and the adequacy of, the relevant equipment, systems, and processes, Plaintiffs would not
8 have purchased and continued purchasing the storage services. In the meantime, PFC, Prelude, and
9 Pacific MSO generated more revenue than they otherwise would have, unjustly enriching themselves.

10 254. Plaintiffs were harmed, and PFC, Prelude, and Pacific MSO's misleading statements and
11 omissions were a substantial factor in causing Plaintiffs' harm.

12 255. Plaintiffs accordingly are entitled to equitable relief, reasonable attorneys' fees and
13 costs, declaratory relief, and a permanent injunction enjoining PFC, Prelude, and Pacific MSO from
14 their unlawful, fraudulent, and deceitful activity.

15 256. Moreover, the conduct of PFC, Prelude, and Pacific MSO set forth herein was
16 reprehensible and subjected Plaintiffs to cruel and unjust hardship in conscious disregard of their rights,
17 constituting oppression, for which PFC, Prelude, and Pacific MSO should be punished by punitive and
18 exemplary damages in an amount according to proof. PFC, Prelude, and Pacific MSO's behavior
19 evidences a conscious disregard for the safety of the eggs and embryos entrusted to them, and by
20 extension, those who placed the eggs and embryos in their care, including Plaintiffs. PFC, Prelude, and
21 Pacific MSO's conduct was and is despicable conduct and constitutes malice under Section 3294 of the
22 California Civil Code. An officer, director, or managing agent of PFC, Prelude, and Pacific MSO
23 personally committed, authorized, and/or ratified the reprehensible conduct set forth herein. Plaintiffs
24 thus seek an award of punitive damages sufficient to penalize PFC, Prelude, and Pacific MSO.

25 257. Pursuant to Civil Code § 1782(a), on June 21, 2018, Plaintiffs—on their own behalf and
26 on behalf of the class—sent letters to Prelude and PFC notifying them of their CLRA violations and
27 affording them the opportunity to correct their business practices and rectify the harm they caused.
28 Plaintiffs sent the CLRA notice via certified mail, return receipt requested, to PFC and Prelude's

principal places of business. These notices are attached to this Complaint as Exhibits 1 and 2. PFC, Prelude, and Pacific MSO failed to correct their business practices or provide the relief requested within 30 days. Therefore, Plaintiffs seek money damages under the CLRA.

258. In accordance with Civil Code § 1780(d), Plaintiffs' CLRA venue declarations are attached to this Complaint as Exhibits 3-9.

SEVENTH CAUSE OF ACTION
Fraudulent Concealment
(Against PFC, Prelude, and Pacific MSO)

259. Plaintiffs incorporate the above and below allegations by reference.

260. PFC, Prelude, and Pacific MSO's acts and practices constitute fraudulent concealment because each of these Defendants failed to disclose information that was material to Plaintiffs' relevant transactions. For example:

a. When offering to provide long-term freezer storage services to Plaintiffs and class members, PFC knowingly and intentionally failed to disclose and actively concealed that it did not have reasonable processes and systems in place to safeguard Plaintiffs' and class members' eggs and embryos;

b. PFC also knowingly and intentionally failed to disclose and actively concealed that it had [REDACTED]; and

c. Prelude and Pacific MSO knowingly and intentionally failed to disclose and actively concealed: (1) that they [REDACTED] had no license, and had no medical personnel on staff; and (2) that their systems and processes in place to safeguard the eggs and embryos were inadequate.

261. PFC had ample means and opportunities to alert Plaintiffs and class members at the outset to the fact that it was not employing reasonable processes and systems to safeguard Plaintiffs' eggs and embryos. Later, PFC also had the means and opportunity to alert Plaintiffs and class members to the fact that [REDACTED]

1 262. Prelude and Pacific MSO also had opportunities to disclose these facts to Plaintiffs,
2 including through their employees, who consulted with customers concerning their tissue.

3 263. Despite these opportunities, PFC, Prelude, and Pacific MSO all independently failed to
4 disclose the above information to Plaintiffs and the other members of the class. Had Defendants made
5 those disclosures, Plaintiffs would not have purchased, or continued purchasing, the long-term freezer
6 storage services at issue.

7 264. PFC had a duty to accurately disclose who was responsible for tissue storage, and to
8 warn of the inadequacies in its tissue storage systems and processes, because it made partial
9 representations concerning the egg and embryo storage operation in place at its facility. PFC
10 volunteered specific information to Plaintiffs through advertising, on its website, and in documents that
11 its storage services were high quality and reliable, including representations that a tank could go
12 without power or liquid nitrogen for “several days” without damaging the tissue it contained. PFC also
13 had exclusive and superior knowledge of the relevant facts, compared to Plaintiffs and class members,
14 yet actively concealed the information rather than disclosing it.

15 265. Prelude and Pacific MSO were under a duty to disclose both the [REDACTED]
16 [REDACTED], and that their storage systems and processes were inadequate, given their exclusive
17 knowledge of these matters. Yet they actively concealed the information rather than disclosing it.

18 266. As a direct and proximate result of PFC, Prelude, and Pacific MSO’s misleading
19 statements and omissions, Plaintiffs have suffered actual damages. Had PFC, Prelude, and Pacific MSO
20 not made misleading statements and omissions regarding the control over, and the adequacy of, the
21 relevant equipment, systems, and processes, Plaintiffs would not have purchased and continued
22 purchasing the storage services. In the meantime, PFC, Prelude, and Pacific MSO generated more
23 revenue than they otherwise would have, unjustly enriching themselves.

24 267. Plaintiffs were harmed, and PFC, Prelude, and Pacific MSO’s misleading statements and
25 omissions were a substantial factor in causing Plaintiffs’ harm.

26 268. The foregoing acts and omissions of PFC, Prelude, and Pacific MSO were committed
27 maliciously, oppressively, deliberately, with intent to defraud, and in reckless disregard of Plaintiffs’
28 rights, interests, and well-being to enrich PFC, Prelude, and Pacific MSO. PFC, Prelude, and Pacific

MSO's conduct warrants an assessment of punitive damages in an amount sufficient to deter such conduct in the future, which amount is to be determined according to proof.

EIGHTH CAUSE OF ACTION
Strict Products Liability – Failure to Warn
(Against Chart)

269. Plaintiffs incorporate the above and below allegations by reference.

270. Chart manufactured, distributed, and/or sold cryogenic equipment used at PFC, including Tank 4.

271. The cryogenic storage tank at issue had potential risks that were known or knowable in light of the scientific and medical knowledge that was generally accepted in the scientific and medical community at the time of the manufacture, distribution, or sale of the cryogenic storage Tank 4.

272. The cryogenic storage Tank 4 was defective and unreasonably dangerous when it left Chart's possession because it did not contain adequate warnings, including warnings concerning the risk of defective seals that may result in catastrophic nitrogen loss, the risk of nitrogen loss and prevalence of this occurrence, the risk of a rise in temperature that can damage and/or cause destruction of eggs or embryos, the rate of failure of the cryogenic storage tanks in the preservation of eggs or embryos or other human tissue, and the need for maintenance, inspection, and/or replacement of the cryogenic storage tanks.

273. The potential risks presented a substantial danger when the cryogenic storage tank at issue was used or misused in an intended or reasonably foreseeable way. The ordinary consumer would not have recognized the potential for risks.

274. Chart had constructive notice or knowledge and knew, or in the exercise of reasonable care should have known, that the cryogenic storage Tank 4 was dangerous, had risks, and was defective in manufacture or design, including because it could cause nitrogen loss resulting in damage to or destruction of frozen reproductive materials, including eggs or embryos.

275. Chart failed to adequately warn or instruct concerning the potential risks of the cryogenic storage tank.

276. It was foreseeable to Chart that failure to adequately warn about the risks of its cryogenic storage tank would cause irreparable harm, including the type of emotional distress suffered by Plaintiffs, whose eggs and embryos were stored therein.

277. As a result of Chart's failures to adequately warn, Plaintiffs were harmed as described herein, regardless of whether it is ever determined conclusively that certain eggs and embryos in Tank 4 are not viable. The lack of sufficient instructions and warnings was a substantial factor in causing Plaintiffs' harm.

NINTH CAUSE OF ACTION
Strict Products Liability – Manufacturing Defect
(Against Chart)

278. Plaintiffs incorporate the above and below allegations by reference.

279. Chart manufactured, distributed, and/or sold the cryogenic storage Tank 4.

280. The cryogenic storage tank contained a manufacturing defect when it left Chart's possession.

281. Chart had constructive notice or knowledge and knew, or in the exercise of reasonable care should have known, that the cryogenic storage tank was dangerous, had risks, and was defective in manufacture, including because it could cause nitrogen loss resulting in damage to or destruction of frozen reproductive materials, including eggs or embryos.

282. As a result of the manufacturing defect in Tank 4, Plaintiffs were harmed as described herein, regardless of whether it is ever determined conclusively that certain eggs and embryos in Tank 4 are not viable.

283. The defective nature of the cryogenic storage tank was a substantial factor in causing Plaintiffs' harm.

TENTH CAUSE OF ACTION
Strict Products Liability – Design Defect – Consumer Expectations Test
(Against Chart)

284. Plaintiffs incorporate the above and below allegations by reference.

285. Chart manufactured, distributed, and/or sold the cryogenic storage Tank 4.

286. The cryogenic storage tank did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way.

1 287. Chart had constructive notice or knowledge and knew, or in the exercise of reasonable
2 care should have known, that the cryogenic storage tank was dangerous, had risks, and was defective in
3 design, including because it could cause nitrogen loss resulting in damage to or destruction of stored
4 frozen reproductive materials, including eggs or embryos.

5 288. As a result of the design defect in Tank 4, Plaintiffs were harmed as described herein,
6 regardless of whether it is ever determined conclusively that certain eggs and embryos in Tank 4 are not
7 viable.

8 289. The cryogenic storage tank's failure to perform safely was a substantial factor in causing
9 Plaintiffs' harm.

10 **ELEVENTH CAUSE OF ACTION**
11 **Strict Products Liability – Design Defect – Risk-Utility Test**
12 **(Against Chart)**

13 290. Plaintiffs incorporate the above and below allegations by reference.

14 291. Chart manufactured, distributed, and/or sold the cryogenic storage Tank 4.

15 292. The benefits of this tank's design are not outweighed by its risks, considering the gravity
16 of the potential harm resulting from the use of the tank, the likelihood that the harm would occur, the
17 feasibility of an alternative safer design at the time of manufacture, and the disadvantages of an
18 alternative design.

19 293. Chart had constructive notice or knowledge and knew, or in the exercise of reasonable
20 care should have known, that the cryogenic storage tank was dangerous, had risks, and was defective in
21 design, including because it could cause nitrogen loss resulting in damage to or destruction of frozen
22 reproductive materials, including eggs or embryos.

23 294. Plaintiffs were harmed because Tank 4 lost liquid nitrogen.

24 295. Chart's design of the tank was a substantial factor in causing Plaintiffs' harm.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, Plaintiffs, individually and on behalf of the class defined above, respectfully
27 request that the Court:
28

1 A. Certify the class under Federal Rules of Civil Procedure 23(a), (b)(2), (b)(3),
2 and/or (c)(4), as appropriate; appoint Plaintiffs as representatives of the class; and appoint the
3 undersigned counsel as class counsel;

4 B. Award Plaintiffs compensatory, restitutionary, rescissory, general, consequential,
5 punitive and exemplary damages in an amount to be determined at trial;

6 C. Award prejudgment interest as permitted by law;

7 D. Enter an appropriate injunction against Defendants and their officers, agents,
8 successors, employees, representatives, and assigns;

9 E. Appoint a monitor and retain jurisdiction to ensure that Defendants comply with
10 the injunctive provisions of any decree of this Court;

11 F. Enter other appropriate equitable relief;

12 G. Award reasonable attorneys' fees and costs, as provided for by law; and

13 H. Grant such other and further relief as the Court deems just and proper.

14 **DEMAND FOR JURY TRIAL**

15 Plaintiffs demand a trial by jury on all issues so triable.

16
17 Dated: November 30, 2018

Respectfully submitted,

18 By: /s/ Adam E. Polk

19 Dena C. Sharp (State Bar No. 245869)

20 Jordan Elias (State Bar No. 228731)

21 Adam E. Polk (State Bar No. 273000)

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Plaintiffs' Counsel

EXHIBIT 1



ATTORNEYS AT LAW

June 21, 2018

**VIA FEDERAL EXPRESS AND
CERTIFIED MAIL RETURN RECEIPT REQUESTED**

Prelude Fertility, Inc.
c/o April P. Eckardt
1100 Johnson Ferry Rd #200
Atlanta, GA 30342

**Re: Notice of Violation of California's Consumers Legal Remedies Act and
Demand for Relief, Pursuant to Cal. Civ. Code § 1782**

To Whom It May Concern:

Girard Gibbs LLP, Lieff Cabraser Heimann & Bernstein, LLP, and Peiffer Wolf Carr & Kane, A.P.L.C. represent A.B., C.D., E.F., G.H., I.J., K.L., M.N., and O.P. ("Plaintiffs"). As reflected in further detail in the attached complaint, filed in *In re Pacific Fertility Center Litigation*, Case No. 3:18-cv-01586-JSC (N.D. Cal.), Plaintiffs allege that Pacific Fertility and Prelude engaged in deceptive acts and practices, including by failing to disclose that their storage tank, electronic monitoring, alarm, and response systems and processes were inadequate to safely store Plaintiffs' eggs and embryos. As a result, on March 4, 2018, Pacific Fertility discovered that the nitrogen levels in a storage tank known as "Tank 4" had dropped to an unsafe level for an undetermined period of time, destroying or jeopardizing the eggs and embryos stored in the tank, including those belonging to Plaintiffs.

Defendants' conduct violates California consumer protection law, including California's Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*, because Pacific Fertility and Prelude:

1. Represented that their services had characteristics, uses, and benefits that they did not have (Cal. Civ. Code § 1770(5));
2. Represented that their services were of a particular standard, quality, or grade when they were not (Cal. Civ. Code § 1770(7));
3. Advertised services with intent not to sell them as advertised (Cal. Civ. Code § 1770(9)); and
4. Represented that the subject of a transaction had been supplied in accordance with a previous representation when it had not (Cal. Civ. Code § 1770(16)).

With this letter, our firms, on behalf of Plaintiffs and a proposed class of all individuals and their reproductive partners who had eggs, embryos, or other material in Tank 4 at Pacific Fertility Center in San Francisco, California on March 4, 2018, demand that you correct your business practices and take prompt action.

To: Prelude Fertility, Inc.
Re: Notice of Violation of CLRA and Demand for Relief
Date: June 21, 2018
Page: 2 of 3

Please direct all communications or responses regarding this notice to the following counsel:

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REQUESTED REMEDIES

Plaintiffs DEMAND THAT WITHIN THIRTY DAYS you remedy your violations by doing the following:

- I. Disseminate a notice reasonably intended to reach all proposed class members, setting forth:
 - a. The existence and description of the *Pacific Fertility Center* litigation, including a summary of the subject matter and the claims asserted;
 - b. The name, address, and telephone number of Plaintiffs' counsel, identified above; and
 - c. The right of proposed class members to obtain the remedies described below.
- II. Subject to monitoring and confirmation by Plaintiffs' counsel, compensate proposed class members for all injuries caused by Pacific Fertility and Prelude's failure to disclose that their systems and processes were inadequate to safely store human reproductive tissue, including for class members' resulting emotional distress, mitigation expenses, and the costs of Defendants' services.
- III. Immediately cease selling services while maintaining systems and processes that are inadequate to safely store human reproductive tissue, until you:
 - a. Allow Plaintiffs' counsel to inspect Pacific Fertility and Prelude's current systems and processes; and

To: Prelude Fertility, Inc.
Re: Notice of Violation of CLRA and Demand for Relief
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Page: 3 of 3

b. Implement all system and process improvements demanded by Plaintiffs' counsel following inspections.

IV. Pay into a court-approved escrow account an amount of money sufficient to pay Plaintiffs' reasonable attorneys' fees and costs.

Please contact us within thirty days to discuss Pacific Fertility and Prelude's implementation of these remedies.

Very truly yours,

GIRARD GIBBS LLP



Adam E. Polk

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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION**

IN RE PACIFIC FERTILITY CENTER
 LITIGATION

Case No. 3:18-cv-01586-JSC

**CONSOLIDATED AMENDED CLASS
 ACTION COMPLAINT**

DEMAND FOR JURY TRIAL

TABLE OF CONTENTS

NATURE OF THE ACTION	1
JURISDICTION AND VENUE	2
INTRADISTRICT ASSIGNMENT.....	3
PARTIES	3
A. Plaintiffs.....	3
B. Defendants	4
1. Prelude	4
2. Pacific Fertility.....	5
3. Chart.....	6
FACTUAL ALLEGATIONS	7
I. Plaintiffs Entrusted Prelude and Pacific Fertility with Keeping their Eggs and Embryos Safe and Secure.	7
A. Defendants market their cryopreservation services as an insurance policy that unwinds the biological clock, preserving the opportunity to have children when the time is right.....	7
B. Defendants market their cryopreservation and storage services to people struggling with infertility.	9
C. Defendants promised to keep Plaintiffs’ eggs and embryos safe in a state-of-the-art facility.....	10
II. Precision and Care Are Required in the Cryopreservation and Storage of Eggs and Embryos.	13
A. The process of retrieving and storing eggs and embryos is demanding, time consuming, and expensive.	13
B. The loss of eggs and embryos results in emotional trauma.	18
C. Successful cryopreservation depends on strict adherence to protocols.	19
III. Defendants Caused Irreparable Harm to Plaintiffs by Failing to Protect Their Eggs and Embryos.	21
A. Prelude and Pacific Fertility should have had systems and processes in place to ensure that Plaintiffs’ eggs and embryos were not damaged.....	21

B.	Chart recalled cryostorage tanks for vacuum seal defects after the Tank 4 incident.....	22
C.	Multiple investigations were opened after the Tank 4 incident.....	22
D.	Defendants’ failure to keep Plaintiffs’ eggs and embryos safe and secure has caused irreparable harm.	23
E.	Pacific Fertility and Prelude’s communications regarding the incident have compounded the harm.....	26
PLAINTIFF-SPECIFIC ALLEGATIONS		29
CLASS ACTION ALLEGATIONS		34
CLAIMS FOR RELIEF		37
FIRST CAUSE OF ACTION		
	Negligence and/or Gross Negligence (Against All Defendants)	37
SECOND CAUSE OF ACTION		
	Breach of Contract (Against Pacific Fertility and Prelude)	40
THIRD CAUSE OF ACTION		
	Bailment (Against Pacific Fertility and Prelude).....	40
FOURTH CAUSE OF ACTION		
	Premises Liability (Against Pacific Fertility and Prelude)	41
FIFTH CAUSE OF ACTION		
	Breach of Fiduciary Duty – Failure to Use Reasonable Care (Against Pacific Fertility and Prelude)	42
SIXTH CAUSE OF ACTION		
	Violations of the Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 <i>et seq.</i> (Against All Defendants)	43
SEVENTH CAUSE OF ACTION		
	Violations of the Consumers Legal Remedies Act, Cal. Civ. Code § 1750 <i>et seq.</i> (Against Pacific Fertility and Prelude)	45
EIGHTH CAUSE OF ACTION		
	Deceit and Fraudulent Concealment (Against Pacific Fertility and Prelude).....	47
NINTH CAUSE OF ACTION		
	Strict Products Liability – Failure to Warn (Against Chart).....	49
TENTH CAUSE OF ACTION		
	Strict Products Liability – Manufacturing Defect (Against Chart).....	50

1	ELEVENTH CAUSE OF ACTION	
2	Strict Products Liability — Design Defect — Consumer Expectations Test (Against Chart) ...	50
3	TWELFTH CAUSE OF ACTION	
4	Strict Products Liability – Design Defect – Risk-Utility Test (Against Chart)	51
5	THIRTEENTH CAUSE OF ACTION	
6	Negligent Failure to Recall (Against Chart)	51
7	PRAYER FOR RELIEF	52
8	DEMAND FOR JURY TRIAL	53

Plaintiffs A.B., C.D., E.F., G.H., I.J., K.L., M.N., and O.P. (“Plaintiffs”), individually and on behalf of all others similarly situated, file this Consolidated Class Action Complaint against Defendants Pacific Fertility Center (“Pacific Fertility” or “PFC”), Prelude Fertility, Inc. (“Prelude”), and Chart Industries (“Chart”) (collectively, “Defendants”) and allege as follows:

NATURE OF THE ACTION

1. Prelude and Pacific Fertility market and sell egg and embryo cryopreservation services. They liken these services to an insurance policy for women and families, claiming the services provide peace of mind to those who wish to defer having children and relief to those seeking to overcome a diagnosis of infertility. Cryopreservation involves preservation of tissue—here, human eggs and embryos—using cooling techniques. In the 1980s, facilities began using a cryopreservation technique known as “slow freezing” to preserve human reproductive tissue. Cryopreservation became more prevalent after the advent in the early 2000s of vitrification, a process by which tissue is cooled more quickly, resulting in higher egg and embryo survival rates. Eggs or embryos frozen through cryopreservation are stored in specially designed metal tanks.

2. Recognizing that the eggs and embryos entrusted to their care are irreplaceable, Prelude and Pacific Fertility promise their clients, including Plaintiffs, that they will use state-of-the-art laboratory equipment and protocols to ensure the safekeeping of the eggs and embryos. Safe storage requires backup redundancies to guard against a catastrophic failure, daily inspections of the tanks, and alarm systems to immediately notify staff of a potential failure.

3. On March 4, 2018, Pacific Fertility discovered that the liquid nitrogen levels in a tank known as “Tank 4” had dropped to an unsafe level for an undetermined period of time, destroying or jeopardizing the eggs and embryos stored in the tank, including those belonging to Plaintiffs. Chart manufactured Tank 4.

4. Pacific Fertility’s first notification of the failure of Tank 4 was via an email sent at four in the morning Pacific time on Sunday, March 11, 2018. Pacific Fertility described the failure as “a very unfortunate incident” in which the storage tank containing Plaintiffs’ cryopreserved eggs and embryos “lost liquid nitrogen for a brief period of time,” and stated that a “preliminary analysis” suggested some of the eggs and embryos in the tank may have been destroyed.

5. Over a month later, on April 19, 2018, Pacific Fertility again wrote to Plaintiffs, notifying them that an investigation had shown the incident resulted from “a failure of the tank’s vacuum seal.” Four days later, Chart recalled several of its cryopreservation tanks, citing “reports of a vacuum leak or failure that could compromise the product.”

6. Pacific Fertility and Prelude were responsible for monitoring Tank 4’s performance for fluctuations in temperature or liquid nitrogen levels, which could endanger the enclosed eggs and embryos, and to maintain safety systems to mitigate a tank failure. Pacific Fertility and Prelude failed in that responsibility, committed gross negligence, and breached their agreement by failing to safely preserve the eggs and embryos under their care.

7. To Plaintiffs’ shock and dismay, Pacific Fertility and Prelude did not separate their eggs or embryos into different tanks to ensure that at least some tissue would be safe if one tank failed.

8. As a result of Defendants’ failures, Plaintiffs and the proposed class have suffered harm. Learning that their reproductive tissue was compromised has caused them devastation, panic, and distress. For many, the tissue in Tank 4 represented their last and only chance for a biological child. Pacific Fertility and Prelude have informed Plaintiffs that it is not possible to know whether their eggs or embryos are viable until they are warmed, and even then, the full extent of the damage cannot be known without attempting a pregnancy. These messages have cast a cloud of uncertainty over women and families, causing anguish and despair.

9. Plaintiffs, individually and on behalf of the class, seek appropriate relief through this action.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this action under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), because (a) Plaintiffs are citizens of states different from Prelude and Chart, (b) the amount in controversy exceeds \$5,000,000, excluding interest and costs, (c) the proposed class consists of more than 100 individuals, and (d) none of the exceptions under the subsection applies to this action.

11. This Court has personal jurisdiction over Defendants. They conduct substantial business in California and intentionally availed themselves of the laws and markets of this state. A significant

portion of the acts and omissions at issue occurred in California, and Plaintiffs and many class members suffered harm in California. Plaintiffs' claims against Defendants are meaningfully connected to California in that: (1) each Plaintiff had eggs and embryos stored at Pacific Fertility, which is located in California and within the Prelude network; and (2) each Plaintiff had eggs and embryos stored in Chart's tank, which was physically located at Pacific Fertility's San Francisco facility, and which failed, resulting in damage to Plaintiffs.

12. Venue is proper in this District under 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District.

INTRADISTRICT ASSIGNMENT

13. Assignment to the San Francisco Division is proper under Local Rules 3-2(c) and (d) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in San Francisco.

PARTIES

A. Plaintiffs

14. Plaintiff A.B. is a citizen and resident of Sacramento County, California.

15. Plaintiff C.D. is a citizen and resident of Sacramento County, California.

16. Plaintiff E.F. is a citizen and resident of San Francisco County, California.

17. Plaintiff G.H. is a citizen and resident of San Francisco County, California.

18. Plaintiff I.J. is a citizen and resident of San Francisco County, California.

19. Plaintiff K.L. is a citizen and resident of San Francisco County, California.

20. Plaintiff M.N. is a citizen and resident of San Francisco County, California.

21. Plaintiff O.P. is a citizen and resident of San Mateo County, California.

22. Given the sensitive nature of their claims and the services they purchased from Pacific Fertility and Prelude, Plaintiffs are using initials in this litigation to protect their privacy. If required by the Court, Plaintiffs will seek permission to proceed under these pseudonyms.

1 **B. Defendants**

2 **1. Prelude**

3 23. At all relevant times, Defendant Prelude Fertility, Inc. was a Delaware corporation
4 headquartered in Florida. Prelude owns and runs a network of fertility clinics and egg and embryo
5 storage facilities—including Pacific Fertility Center—across the country.

6 24. Prelude was founded in 2016 by startup entrepreneur Martin Varsavsky with a \$200
7 million investment by New York-based Lee Equity Partners. Prelude’s stated business plan is to create
8 a national network of fertility clinics, as well as egg and embryo cryopreservation and storage centers
9 “all delivered with the highest level of personalized care by the nation’s leading reproductive
10 endocrinologists and practitioners.”¹ According to Varsavsky, “What Prelude does is bridge the gap, it
11 makes people’s biology meet their psychology” through “The Prelude Method”: “You freeze your
12 gametes when fertile, thaw them and create embryos when ready, genetically sequence the embryos,
13 and then transfer one embryo at a time. And you continue to do this until you achieve your desired
14 number of children.”²

15 25. Included within the Prelude network is MyEggBank, which Prelude claims has the
16 largest and most diverse selection of egg donors in the country. Prelude also claims that its embryo
17 survival rates are greater than 90% and that women who use eggs from MyEggBank have a 90%
18 pregnancy success rate within three cycles.³

19 26. Prelude acquired Pacific Fertility in September 2017 as part of Prelude’s business plan
20 to build its national network. Prelude directs potential clients to Pacific Fertility via its website and its
21 network of fertility clinics. Prelude also provides financing plans for services at Pacific Fertility.
22
23
24

25 ¹ *A Modern Approach to Family*, Prelude Fertility, <https://www.preludefertility.com/about> (last visited May 18, 2018).

26 ² Martin Varsavsky, *Why I founded Prelude Fertility: Background on vision and bringing on the team to make it*
27 *thrive* (Mar. 7, 2017), <http://vator.tv/news/2017-03-07-why-i-founded-prelude-fertility> (last visited May 30, 2018).

28 ³ *Have Questions?*, Prelude Fertility, <https://preludefertility.com/faq> (last visited May 18, 2018).

27. Prelude represents that Pacific Fertility is one of “Our Clinics.”⁴ It represents that Pacific Fertility’s clients are “Our” clients.⁵

28. In its press release announcing the addition of Pacific Fertility to its network of fertility clinics, Prelude described “egg freezing, in vitro fertilization (IVF), genetic screening of embryos, and donor egg matching” as part of “Prelude’s comprehensive services.”⁶

29. Prelude owns the laboratory, storage facility, and tanks at Pacific Fertility. It owned Tank 4 at the time of the March 4, 2018, incident.

30. The employees responsible for performing daily monitoring and maintenance of the tanks, including Tank 4, are employees of Prelude.

2. Pacific Fertility

31. Defendant Pacific Fertility Center is a private unincorporated entity located at 55 Francisco Street, Suite 500, San Francisco, California 94133.

32. Pacific Fertility was founded in 1999 and provides a full range of fertility services, including egg cryopreservation, IVF, genetic testing, “cutting-edge laboratory techniques and technology such as . . . vitrification,” and storage of cryopreserved eggs and embryos.⁷

33. At all relevant times, Pacific Fertility’s on-site San Francisco laboratory has cryopreserved and stored eggs and embryos, including those belonging to Plaintiffs.⁸

34. At the time of the March 4, 2018, incident, Tank 4 was located at Pacific Fertility Center’s laboratory in San Francisco.

⁴ *Options Preserved, Our Clinics*, Prelude Fertility, <https://www.preludefertility.com/freeze-eggs> (last visited May 18, 2018).

⁵ *Pacific Fertility Center: San Francisco*, Prelude Fertility, <https://www.preludefertility.com/clinic/pacific-fertility-center> (last visited May 18, 2018).

⁶ *Prelude Fertility Expands Network with Pacific Fertility Center in San Francisco*, Prelude Fertility, <https://www.prnewswire.com/news-releases/prelude-fertility-expands-network-with-pacific-fertility-center-in-san-francisco-300524534.html> (last visited May 18, 2018).

⁷ *Prelude Fertility Expands Network with Pacific Fertility Center in San Francisco*, Prelude Fertility, <https://www.preludefertility.com/press-release/prelude-fertility-expands-network-pacific-fertility-center-san-francisco> (last visited May 20, 2018).

⁸ *Sperm and Embryo Freezing*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/sperm-and-embryo-freezing> (last visited May 18, 2018).

3. Chart

35. Defendant Chart Industries, Inc. is a Delaware corporation headquartered in Georgia.⁹

36. Founded in 1992, Chart is a publicly traded global manufacturer of equipment used in the production, storage, and application of industrial gases. Chart produces a variety of cryogenic equipment. On its website, Chart states that its “focus is cryogenics.”¹⁰ Chart claims that its products “utilize our proprietary vacuum and insulation technologies, including storage equipment,” and that “[o]ur industry-proven core-competency provides the highest insulation thermal performance in cryogenics[.]”¹¹ Chart touts itself as “a recognized global brand for the design and manufacture of highly engineered cryogenic equipment” and a “leading global manufacturer of vacuum insulated products and cryogenic systems.”¹²

37. In its annual report for 2017, Chart described itself as a “leading diversified global manufacturer of highly engineered equipment, packaged solutions, and value-add services used throughout the gas to liquid cycle in all industries that require gases as cryogenic liquids or alternative equipment for gas generation, generally for the industrial gas, energy, and biomedical industries.”¹³

38. Through its MVE brand, Chart sells a line of cryogenic equipment that includes freezers and metal storage tanks. Chart claims that its cryogenic products “are engineered for reliability and durability”¹⁴ and that its MVE brand “is the benchmark for biological storage systems, used for the cryogenic preservation of human . . . tissues.”¹⁵

⁹ Plaintiffs only recently discovered the identity of the manufacturer—Defendant Chart—of the cryostorage tank in which Plaintiffs’ and class members’ eggs and embryos were stored at Pacific Fertility. Chart is being served concurrently with the filing of this Consolidated Amended Complaint.

¹⁰ *About Chart*, Chart Industries, <http://www.chartindustries.com/About-Chart> (last visited May 20, 2018).

¹¹ *Cryogenics*, Chart Industries, <http://www.chartindustries.com/Industry/Markets-Served/Cryogenics> (last visited May 20, 2018).

¹² *MVE Cryopreservation for Life Science*, Chart Industries, <http://files.chartindustries.com/Cryopres%20Catalog%20ML-CRYO0009%20K%203b.pdf> (last visited May 20, 2018).

¹³ *SEC Form 10-K*, Chart Industries, <http://ir.chartindustries.com/Cache/392303934.pdf> (last visited May 20, 2018).

¹⁴ *Life Sciences*, Chart Industries, <http://www.chartindustries.com/Life-Sciences> (last visited May 20, 2018).

¹⁵ *About Chart*, Chart Industries, <http://www.chartindustries.com/About-Chart> (last visited May 20, 2018).

39. Chart's BioMedical segment accounted for around 20% of its total sales. Its "cryobiological storage products include vacuum insulated containment vessels for the storage of biological materials."¹⁶ Chart describes the competition for cryobiological storage products as "significant" and notes that "competition in this field is focused on design, reliability, and price."¹⁷

40. Chart designed and manufactured the storage tank in which Plaintiffs' eggs and embryos were stored on the date of the subject incident.

FACTUAL ALLEGATIONS

I. Plaintiffs Entrusted Prelude and Pacific Fertility with Keeping their Eggs and Embryos Safe and Secure.

41. Defendants Prelude and Pacific Fertility have partnered to offer cryopreservation and storage of eggs and embryos, among other fertility services.

42. Prelude claims that it is "on a mission" to provide "the best options, science, and care so everyone can have the opportunity to be a mom or dad when they are ready."¹⁸

43. Pacific Fertility states that it has one goal: to help clients build a healthy family.¹⁹

A. Defendants market their cryopreservation services as an insurance policy that unwinds the biological clock, preserving the opportunity to have children when the time is right.

44. Human eggs, also known as oocytes, are a limited resource. According to Pacific Fertility, a woman has about 600,000 eggs at birth, and this supply diminishes at the rate of about 1,000 per month, beginning at her birth.²⁰ This decline is part of the natural aging process and is commonly referred to as a woman's biological clock. The loss of oocytes from the ovaries is relentless and

¹⁶ SEC Form 10-K, Chart Industries, <http://ir.chartindustries.com/Cache/392303934.pdf> (last visited May 20, 2018).

¹⁷ *Id.*

¹⁸ *A Modern Approach to Family*, Prelude Fertility, <https://www.preludefertility.com/about> (last visited May 18, 2018).

¹⁹ *Pacific Fertility Center*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/the-center/infertility-center> (last visited May 28, 2018).

²⁰ *Egg Freezing in Northern California*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/fertility-preservation-egg-freezing> (last visited May 27, 2018).

continues even in the absence of menstrual cycles, and even when women are pregnant, nursing, or taking oral contraceptives. In addition, as Pacific Fertility acknowledges, egg quality diminishes with time, with miscarriages and chromosomal abnormalities occurring more frequently the older a woman is at the time of pregnancy. By their early-to-mid 40s, women typically can no longer conceive a child naturally.²¹

45. The purpose of egg cryopreservation is to allow women and their reproductive partners to preserve eggs so that they may be fertilized and implanted at a later time. Both Pacific Fertility Center and Prelude emphasize that their cryopreservation and storage services allow for flexibility in their clients' family planning, freeing women, for example, to wait for the right person and to focus on their careers during their most fertile years.

46. Prelude advertises its cryopreservation and storage services as providing women with "peace of mind" and more control over their childbearing choices.²² In marketing its cryopreservation and storage services, Prelude specifically appeals to women's declining fertility and limited eggs: "Age Matters . . . We're born with all the eggs we'll ever have—and their quantity and quality decrease as we age. If you think you might want a baby someday, but aren't ready right now, freezing your eggs keeps your options open."²³ Prelude likewise states that young women cryopreserve eggs "to have the option—an insurance policy that unwinds the biological clock and lets women pursue career advancement as freely as men without having to compromise in their choice of partner."²⁴

47. In large type, Prelude states on its website, "Options Preserved," and proceeds to advertise multiple benefits from cryopreservation and storage:

²¹ *Id.*

²² *Meet Prelude Fertility, The \$200 Million Startup That Wants To Stop The Biological Clock*, Forbes (Oct. 17, 2016), <https://www.forbes.com/sites/miguelhelft/2016/10/17/prelude-fertility-200-million-startup-stop-biological-clock/#d05688c7260f>.

²³ *Options Preserved*, Prelude Fertility, <https://www.preludefertility.com/freeze-eggs> (last visited May 18, 2018).

²⁴ *Meet Prelude Fertility, The \$200 Million Startup That Wants To Stop The Biological Clock*, Forbes (Oct. 17, 2016), <https://www.forbes.com/sites/miguelhelft/2016/10/17/prelude-fertility-200-million-startup-stop-biological-clock/#d05688c7260f>.

Find that right person. Focus on your career. Finish your education. The age of your eggs (not you) is the number one cause of infertility. Freeze your eggs to preserve your option to build a family when you're ready."²⁵

Prelude goes on to describe the storage process as hassle free: "Set it and forget it until you're ready."²⁶

48. Pacific Fertility offers egg cryopreservation services as a means of preserving "a precious resource, limited to just a few years of your life[.]" and states that cryopreserving eggs and embryos "can increase your chances of conception by 5 to 10 times."²⁷

49. Pacific Fertility touts similar benefits from its fertility preservation services:

6 Reasons to Preserve Your Fertility Today! (1) For a future family . . . (2) To allow for educational pursuits . . . (3) To have time to develop a business or career . . . (4) To give your relationship time to mature . . . (5) To reduce the risk of medical treatments that might impact fertility . . . (6) To achieve control over your future."²⁸

B. Defendants market their cryopreservation and storage services to people struggling with infertility.

50. Defendants also promote their egg and embryo cryopreservation and storage services to people diagnosed with infertility.

51. Infertility is defined as the inability to conceive after one year of unprotected intercourse if a woman is under the age of 35, or after six months if a woman is 35 or older.

52. Pacific Fertility states that it sees infertility as a "workable challenge."²⁹

53. Similarly, Prelude states: "we're here to help you become a parent. We'll use all of our training, science, technology, lab skills, and most importantly, human-kindness skills, to fully support you through every step of the process."³⁰

²⁵ *Options Preserved*, Prelude Fertility, <https://www.preludefertility.com/freeze-eggs> (last visited May 18, 2018).

²⁶ *Id.*

²⁷ *Should I freeze my eggs?*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/fertility-preservation/my-eggs> (last visited May 18, 2018).

²⁸ *6 Reasons to Preserve Your Fertility Today!*, Pacific Fertility Center (June 30, 2017), <https://www.pacificfertilitycenter.com/fertility-preservation/blog/6-reasons-to-preserve-your-fertility-today>.

²⁹ *Pacific Fertility Center*, <https://www.pacificfertilitycenter.com/the-center/infertility-center> (last visited May 20, 2018).

³⁰ *Let's Make a Baby*, Prelude Fertility, <https://www.preludefertility.com/ivf> (last visited May 27, 2018).

54. For many individuals and couples experiencing infertility, Defendants' embryo cryopreservation services represented their best and only hope of having a biological child or of having children who are biological siblings.

C. Defendants promised to keep Plaintiffs' eggs and embryos safe in a state-of-the-art facility.

55. Defendants emphasize that eggs and embryos will be safely stored, indefinitely, for future family planning.

56. Prelude's marketing messages recognize the importance of proper egg storage for those who use its services. A Prelude spokesperson, Allison Johnson, said: "If you know that your eggs are safe and sound, what decisions would you make about your life? . . . Go pursue that graduate degree. Wait for your soul mate. Go travel the world. Your eggs are waiting for you. For me that's as liberating for women as the pill was in the 60s."³¹

57. Pacific Fertility states that its clients' "[e]ggs remain frozen until you need them"³² and that "there is no limit to how long cells remain viable in the frozen state."³³

58. Regarding embryos, Pacific Fertility similarly reassures its clients that some "have come back after 10-15 years and the embryos have been thawed successfully and created healthy babies."³⁴

59. Pacific Fertility claims that its laboratory is state of the art, meeting a "gold standard,"³⁵ and that it has a large and experienced laboratory staff dedicated to the "care and well being of eggs, embryos and sperm."³⁶

³¹ *Meet Prelude Fertility, The \$200 Million Startup That Wants To Stop The Biological Clock*, Forbes (Oct. 17, 2016), <https://www.forbes.com/sites/miguelhelft/2016/10/17/prelude-fertility-200-million-startup-stop-biological-clock/#d05688c7260f>.

³² What is the process?, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/fertility-preservation/my-eggs#treatment> (last visited May 18, 2018).

³³ *Sperm and Embryo Freezing*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/sperm-and-embryo-freezing> (last visited May 18, 2018).

³⁴ *Id.*

³⁵ *Pacific Fertility Center*, <https://www.pacificfertilitycenter.com/the-center/infertility-center> (last visited May 20, 2018).

³⁶ *IVF Laboratory Team*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/fertility-specialists/ivf-laboratory-team> (last visited May 20, 2018).

60. Since the advent of cryopreservation, the main techniques to cryopreserve eggs and embryos have been slow freezing and vitrification. With slow freezing—first used in 1986—it takes about two hours for eggs to reach final storing temperature. Starting in the mid-2000s, eggs and embryos began to be preserved through a rapid cryopreservation process called vitrification.

61. Vitrification is a more advanced and reliable technology that Pacific Fertility describes as being “used in the embryo and egg freezing process so that they can be stored for later use.”³⁷ Pacific Fertility states the newer vitrification process is safer than earlier slow-freezing technologies, which could lead to crystallization threatening the viability of cryopreserved tissue. “Avoiding ice formation in this way,” Pacific Fertility represents, “successfully protects the embryos from damage and allows them to be warmed later giving survival rates consistently above 90%.”³⁸

62. Pacific Fertility further states that all eggs and embryos would be stored in vacuum-lined liquid nitrogen tanks—“like a large thermos flask”—that “are computer controlled and monitored 7 days a week with a dedicated alarm system.”³⁹

63. Pacific Fertility claims that liquid nitrogen “is very stable and easy to work with” and that each tank is equipped with numerous sensors to monitor temperature increases above -196°C or a drop in the level of liquid nitrogen.⁴⁰ Pacific Fertility also claims that the sensors “are connected to a telephone alarm system that will alert staff to an alarm condition outside of normal working hours. . . . The alarm system is tested weekly and continues to run on battery power in the event of a power failure. The alarm system can also be checked remotely.” When a tank alarm goes off, the on-call embryologist is supposed to arrive within 30 minutes regardless of time of day and must conduct a physical inspection of the tank before the alarm can be turned off.⁴¹

³⁷ *Vitrification, Oocyte and Embryo Vitrification*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/vitrification> (May 18, 2018).

³⁸ *Id.*

³⁹ *Sperm and Embryo Freezing*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/sperm-and-embryo-freezing> (last visited Mar. 23, 2018).

⁴⁰ *Id.*

⁴¹ *Id.*

64. Pacific Fertility further claims that, in addition to being constantly monitored, each tank “gets a physical inspection daily, looking for problems or signs of problems,” and that the amount of nitrogen in the tank “is assessed as a means of monitoring for a possible slow leak or an impending tank failure.”⁴²

65. Each tank is also supposed to receive a daily refill of nitrogen because the nitrogen in the tanks continuously evaporates at a slow rate.⁴³ It is standard in the egg and embryo storage industry for facilities to equip their tanks with autofilling mechanisms to refill the liquid nitrogen when the system detects that levels are low.

66. Pacific Fertility advertises the durability of its tanks and storage facility on its website, stating:

The storage tanks require no power and would not be impacted by a power failure or blackout. They are made of metal and would probably survive a small or moderate fire. If the tanks were not physically damaged or knocked over in a disaster, they should survive intact. Even if no one was able to physically check the tanks, or if we were unable to obtain liquid nitrogen, the tanks should still maintain their temperature for several days.⁴⁴

67. Pacific Fertility represents that its egg and embryo cryopreservation and freezing services are highly successful, with egg survival rates of 83%⁴⁵ and embryos survival rates consistently above 90%.⁴⁶

68. Prelude also touts “greater than 90%” egg and embryo survival rates.⁴⁷

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Lab FAQs*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/the-center/lab-faq> (May 20, 2018).

⁴⁵ *What are your success rates?*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/fertility-preservation/my-eggs#success> (last visited May 20, 2018).

⁴⁶ *Vitrification, Oocyte and Embryo Vitrification*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/vitrification> (May 18, 2018).

⁴⁷ *Have Questions?, What are the chances of pregnancy with frozen embryos?*, Prelude Fertility, <https://www.preludefertility.com/faq> (last visited May 27, 2018).

II. **Precision and Care Are Required in the Cryopreservation and Storage of Eggs and Embryos.**

A. **The process of retrieving and storing eggs and embryos is demanding, time consuming, and expensive.**

69. People who use Defendants' cryopreservation services typically make an enormous emotional investment. They endure painful and invasive procedures, financial stress, and the strain the process puts on their mental health and relationships with others, all in the hopes that one day they will be able to have a child.

70. Women take drug and hormone cocktails and injections over several weeks to stabilize the uterine lining, stimulate ovaries into producing follicles, and stop these ovary follicles from releasing eggs. Then, after an ovulation trigger injection, eggs are collected under sedation or a general anesthetic. A woman may be subjected to multiple painful injections each day, resulting in bruising, swelling, and overall discomfort. The drug and hormone therapy may also trigger other side effects, such as tiredness, nausea, headaches, and blood clots, as well as negative emotions. Many women also undergo acupuncture sessions, recommended by Pacific Fertility, to improve IVF outcomes. The process can limit travel and other activities, and often requires time off from work. The harvesting procedure itself can be painful and hard to endure, requiring insertion of a thick needle through the vaginal wall to drain the ovary follicles of their fluid. After the procedure, a woman often experiences residual pain for about a week and may need bed rest for several days. Some women suffer significant side effects, such as ovarian hyperstimulation syndrome, requiring hospitalization.

71. Undergoing egg retrieval is "emotionally trying" as well as physically demanding.⁴⁸ Pacific Fertility acknowledges that feelings of anxiousness, depression, isolation, and helplessness are common among clients undergoing IVF services, and that strained and stressful relations with spouses, partners, and other loved ones are also common. IVF typically causes those undergoing treatment to

⁴⁸ *Patient Support*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/patient-support> (last visited May 27, 2018).

rely heavily on friends and significant others for support, including, for example, with coping with stress and providing rides to and from appointments.⁴⁹

72. According to Pacific Fertility's website, "the time and energy that is needed, both physically and emotionally can drain even the staunchest crusader."⁵⁰

73. According to one research study, half of women seeking IVF services described infertility as the most upsetting experience of their lives.⁵¹ Other studies show that infertility causes anguish similar to that accompanying a cancer diagnosis or the loss of a loved one.⁵² Infertility is associated with anger, depression, anxiety, marital problems, and loss of self-esteem among prospective parents experiencing infertility.⁵³ Pacific Fertility warns clients that they may experience intense anger, despair, and guilt, and that it is "is very common to experience symptoms of anxiety and depression as a result of this experience."⁵⁴

74. The cryopreservation process compounds these emotions and stresses. For many, this process represents their last hope for having children. Each cycle can produce anxiety and fear that there won't be enough eggs retrieved, or that the eggs retrieved won't be of a high enough quality. Multiple cycles are often required. Many women experience and express strong feelings of anxiety, failure, hopelessness, and disappointment during this process.

75. Prelude acknowledges its clients' vulnerability during the cryopreservation process and trains its staff on how to empathize with clients:

⁴⁹ *Resources at Your Fingertips*, Pacific Fertility Center (Nov. 22, 2004), <https://www.pacificfertilitycenter.com/blog/fertility-resources-your-fingertips>.

⁵⁰ *Id.*

⁵¹ *The psychological impact of infertility and its treatment*, Harvard Medical School (May 2009), https://www.health.harvard.edu/newsletter_article/The-psychological-impact-of-infertility-and-its-treatment.

⁵² A.D. Domar et al., *The psychological impact of infertility: a comparison with patients with other medical conditions*, *Journal of Psychosomatic Obstetrics & Gynecology* (1993), <https://www.massgeneral.org/bhi/assets/pdfs/publications/Domar%201993%20J%20Psychosom%20Obstet%20Gynaecol.pdf>; C. A. Bryson, *Post IVF syndrome? Psychological implications of failed IVF*, *The Obstetrician & Gynaecologist* (2002), <https://obgyn.onlinelibrary.wiley.com/doi/pdf/10.1576/toag.2002.4.4.201>.

⁵³ P.K. Dekar et al., *Psychological aspects of infertility*, *British Journal of Medical Practitioners* (2010), <http://www.bjmp.org/content/psychological-aspects-infertility>.

⁵⁴ *Coping Strategies*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/coping-strategies> (last visited May 20, 2018).

Fertility is such an incredibly personal and vulnerable subject. The World Health Organization has designated infertility as the ‘third biggest global epidemic,’ and yet as a society, we hardly even talk about it . . . until it gets personal. As more people delay childbirth past their peak fertility years to pursue careers, advanced degrees, or the right life partner, the chances of having a baby the old fashioned way start to decline.⁵⁵

* * *

As women, mothers, sisters, and daughters we make it a priority to educate and support all of our staff on how it feels to go through these journeys and how much it means.⁵⁶

76. “The emotional part is driving what we are trying to do,” Prelude’s chief revenue officer said. She further noted that a number of Prelude’s own employees have been touched by infertility.⁵⁷

77. “Emotional health” and “well being” are central to Pacific Fertility’s stated mission:

We are dedicated to a whole patient approach. We recognize that fertility treatment may impact all corners of our patient’s lives, including work, personal relationships and financial concerns. When designing their treatment course, our physicians, nurses and counselors work with them to accommodate all of these considerations.

Our support is integrated. Emotional health and well being are central to our patient’s care. Our clinic’s services include acupuncture and an array of Mind/Body and stress reduction workshops, seminars and support groups. Our in-house family therapist is available to any patient and will also gladly provide referrals to other qualified professionals.⁵⁸

78. Pacific Fertility recognizes the need to address clients’ “emotional and even spiritual needs” during the “emotional ups and downs” of infertility:

At PFC, we know that the physical demands and emotional ups and downs of

⁵⁵ *A Modern Approach to Family*, Prelude Fertility, <https://www.preludefertility.com/about> (last visited May 20, 2018).

⁵⁶ *Id.*

⁵⁷ *Meet Prelude Fertility, The \$200 Million Startup That Wants To Stop The Biological Clock*, Forbes (Oct. 17, 2016), <https://www.forbes.com/sites/miguelhelft/2016/10/17/prelude-fertility-200-million-startup-stop-biological-clock/#d05688c7260f>.

⁵⁸ *Fertility Treatment and Care*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/fertility-treatment-and-care> (last visited May 27, 2018).

infertility experience can impact life at home, at work and with family. This is a path that one likely did not anticipate and, while there is much reason for hope, the treatment process can also be emotionally trying. The well being of our patients is a crucial aspect of fertility treatment, and we encourage our patients to take advantage of the many resources we have developed to address the emotional and even spiritual needs they may have as a part of their journey.

PFC's extensive support system includes a devoted patient care team, experienced clinical coordinators and educators and an in-house marriage and family therapist who has long specialized in fertility and third party parenting issues.⁵⁹

79. Acknowledging the stress and challenges those contending with infertility face, Pacific Fertility promises its clients that it will be "by their side every step of the way":

A diagnosis of infertility can feel overwhelming and stressful for individuals and couples who always assumed that pregnancy would come easily. At Pacific Fertility Center, we see infertility as a workable challenge. . . .

We feel strongly that the physical well being is tied to emotional well being, and we take into account all of the challenges[,] . . . [including d]iagnosis, treatment and the inevitable 'waiting game' as well as financial stress We are by their side every step of the way to help address each and all of these needs.⁶⁰

80. Pacific Fertility and Prelude's services are costly. Clients pay more than \$8,000 for a single cycle of egg cryopreservation, which includes clinical monitoring, egg retrieval, cryopreservation, and one year of egg storage. Additional cycles cost \$6,995 each. Pacific Fertility recommends storing more eggs than a woman typically produces in a single cycle.⁶¹ It is not uncommon for women to undergo three or more egg cryopreservation cycles.

⁵⁹ *Patient Support*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/patient-support> (last visited May 27, 2018).

⁶⁰ *Pacific Fertility Center*, <https://www.pacificfertilitycenter.com/the-center/infertility-center> (last visited May 20, 2018).

⁶¹ *How many eggs do I need to freeze?*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/fertility-preservation/ask-us#how-many> (last visited May 21, 2018); *How Many Eggs Should I Freeze?*, Southern California Reproductive Center, <https://blog.scrxiv.com/how-many-eggs-should-i-freeze> (last visited May 21, 2018).

81. The costs incurred to cryopreserve embryos are even higher. Pacific Fertility charges \$11,595 for basic IVF, including clinical monitoring, egg retrieval, lab processing, and embryo transfer.⁶² If a client chooses to use Comprehensive Chromosome Screening to select the healthiest embryo to transfer, Pacific Fertility's basic IVF costs rise to \$16,085.⁶³

82. The above amounts do not include the costs of in-person consultations (\$375), pre-cycle lab work, egg cryopreservation medications (\$2,000–6,000), embryo transferring (\$2,845–4,460), embryo transfer medications (\$300–600), and continuing charges for egg and embryo storage (\$600 per year).⁶⁴ Clients typically also pay thousands of dollars for fertility drugs leading up to egg retrieval, and often spend hundreds of dollars on acupuncture and other recommended services to improve outcomes. The entire process often costs many tens of thousands of dollars.

83. Most insurance plans do not cover egg cryopreservation and other fertility services.⁶⁵ A 2017 study by Mercer found that only 26% of companies with over 500 employees cover IVF.⁶⁶ As a result, people seeking fertility services have taken out home equity loans, borrowed from their 401(k) accounts, tapped their lines of credit, and moved in with their parents.⁶⁷

84. In part because of these challenging processes, costs, and experiences, many clients form strong emotional attachments to their eggs and embryos. It is not unusual for women and their reproductive partners to think about their eggs or embryos every day.

⁶² *In-Vitro Fertilization (IVF) Costs*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/financing-fees/vitro-fertilization-ivf-costs> (last visited May 21, 2018).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Fertility treatments are becoming a financial and physical risk for many Americans*, CNBC (Nov. 20, 2017), <https://www.cnbc.com/2017/11/17/most-patients-getting-ivf-arent-covered-by-insurance.html>; M. Inhorn et al., *Medical egg freezing: How cost and lack of insurance cover impact women and their families*, Reproductive Biomedicine & Society Online (Jan. 21, 2018), <https://www.sciencedirect.com/science/article/pii/S2405661818300017>.

⁶⁶ *Fertility treatments are becoming a financial and physical risk for many Americans*, CNBC (Nov. 20, 2017), <https://www.cnbc.com/2017/11/17/most-patients-getting-ivf-arent-covered-by-insurance.html>.

⁶⁷ *Id.*; *Infertility Treatment Grants and Scholarships*, RESOLVE, <https://resolve.org/what-are-my-options/making-infertility-affordable/infertility-treatment-grants-scholarships/> (last visited May 21, 2018).

B. The loss of eggs and embryos results in emotional trauma.

85. Prelude and Pacific Fertility are well aware of the lengths to which people go to obtain eggs and embryos, how much these eggs and embryos mean to their clients, the clients' emotional investment in the survival of the eggs and embryos, and the clients' expectations that great care will be taken to preserve and protect the eggs and embryos to avoid irreparable, devastating harm.

86. Eggs and embryos are precious. They offer the opportunity to fulfill one of the most fundamental human urges: to become a parent and create one's own family when the time is right. Even for those who have already met their family planning goals, their remaining eggs and embryos retain emotional value. Many opt to continue storing their eggs and embryos for years after they have successfully had children. Some hold funeral ceremonies for embryos.⁶⁸ Others who no longer plan to use their eggs and embryos hope to donate them to a family member or other couple struggling with infertility, or toward beneficial research.

87. Eggs and embryos are irreplaceable. As women age, their egg quantity and quality diminish. The most determinative factor in IVF success is the woman's age at the time her eggs were extracted. At some point, usually around her mid-40s, a woman can no longer produce viable eggs. Even if additional eggs can be retrieved, one cannot replace 35-year-old eggs with 42-year-old eggs and expect the same result. When eggs and embryos are damaged or compromised, it may be impossible for clients to have their own biological children. There is no possibility of creating substitute embryos for cancer survivors or those whose spouses have died. Likewise, those who used donor eggs or sperm to create embryos may find it impossible to retrieve additional material from the same donors. Thus, donor-users who already have children may be prevented from having additional children who are biologically related to their siblings.

88. At the time of their freezing, most of the eggs and embryos that Pacific Fertility stored were viable rather than being compromised or incapable of successful fertilization or implantation.

⁶⁸ J. Fraga, *After IVF, Some Struggle With What To Do With Leftover Embryos*, NPR (Aug. 20, 2016), <https://www.npr.org/sections/health-shots/2016/08/20/489232868/after-ivf-some-struggle-with-what-to-do-with-leftover-embryos>.

Most of the embryos that Pacific Fertility stored had been tested and found free of chromosomal abnormalities.

89. The success or failure of egg and embryo cryopreservation and storage services has emotional and psychological ramifications for those seeking to become parents. Losing an egg or embryo provokes the fear that having a child is no longer possible, causing feelings of devastation and despair. Many experience grief and anguish when fertility treatment does not result in pregnancy or when they lose fertility choices.⁶⁹ Pacific Fertility's website itself provides coping strategies and techniques for reducing stress.⁷⁰

C. Successful cryopreservation depends on strict adherence to protocols.

90. Eggs and embryos are fragile. It is critical that they be handled and stored carefully. Cooling, warming, and the removal of cryoprotectants must follow precise, controlled protocols. Failure to adhere to these protocols can kill the egg or embryo, impair implantation and viability, and introduce chromosomal abnormalities.

91. Egg and embryo cryopreservation entails preserving the reproductive material at subzero temperatures. A key goal of cryopreservation is to reduce cell damage caused by the formation of ice crystals and the expansion of water as cryopreserved material cools to subzero temperatures. According to Pacific Fertility, "[t]he key to successful egg freezing is determining a technique that will not damage the fragile chromosomes of the egg"; this is because "the chromosomes of the egg are vulnerable to damage, including damage from the exertion of the freezing and thawing process."⁷¹

92. As noted above, two primary cryopreservation technologies have emerged. Both rely upon cryoprotectants, which are solutions added to the cells that reduce cell damage by displacing water in a manner similar to antifreeze. The first technology, slow freezing (also known as slow programmable freezing), utilizes specialized laboratory equipment that lowers the temperature of

⁶⁹ C. A. Bryson, *Post IVF syndrome? Psychological implications of failed IVF*, The Obstetrician & Gynaecologist (2002), <https://obgyn.onlinelibrary.wiley.com/doi/pdf/10.1576/toag.2002.4.4.201>.

⁷⁰ *When to See a Therapist*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/when-to-see-a-therapist> (last viewed May 20, 2018).

⁷¹ *New Clinical Study: New Technique for Egg Freezing*, Pacific Fertility Center (Feb. 25, 2006), <https://www.pacificfertilitycenter.com/blog/new-clinical-study-new-technique-egg-freezing>.

embryos conditioned with cryoprotectants in a slow, controlled manner to -190°C . The second and newer technology, vitrification, refers to any process resulting in “glass formation”—that is, the transformation from a liquid to a hardened liquid with minimal crystallization (ice crystals). According to Pacific Fertility, vitrification “cools the cells in the embryo at rates close to 5,000 degrees per minute[,]” and “embryos that are vitrified are exposed to 5-10 times more cryoprotectant than slow frozen embryos.”⁷² The ultra-rapid nature of this process minimizes (1) the formation of ice crystals and (2) toxicity damage to the cells that cryoprotectants can cause during longer exposure to warmer temperatures.

93. The process of warming eggs and embryos that have been preserved through cryopreservation is also precise and dependent on specialized techniques and chemical solutions. Pacific Fertility states that “embryos coming out of the freezer (at -196°C) are warmed to room temperature in a maximum of three seconds. This rapid warming method minimizes damage to the embryo from ice crystals that can form during warming.”⁷³ A key part of the warming procedure is the careful dilution and eventual replacement of the toxic cryoprotectant fluid with a solvent compatible with cytoplasmic fluid. Pacific Fertility states that it “incubat[es] the embryo in decreasing concentrations of the antifreeze, and increasing concentrations of water. Over a period of 15 minutes, the embryo is stepped through 3 different solutions, until finally the antifreeze is gone and all the water has been replaced.”⁷⁴

94. For slow-frozen tissue, the failure to thaw slowly can result in cells over-expanding, rupturing, and dying. For vitrification, it is important to warm quickly to avoid ice formation. Thus, it is critical that tissue cryopreserved through slow freezing be thawed slowly, and that tissue cryopreserved through vitrification be warmed quickly.⁷⁵ An uncontrolled rise in temperature, like the one at issue here, can have catastrophic consequences for eggs and embryos.

⁷² *Vitrification, Oocyte and Embryo Vitrification*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/vitrification> (May 18, 2018).

⁷³ *Lab FAQs*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/the-center/lab-faq> (May 20, 2018).

⁷⁴ *Id.*

⁷⁵ *Vitrification, Oocyte and Embryo Vitrification*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/vitrification> (May 18, 2018).

1 **III. Defendants Caused Irreparable Harm to Plaintiffs by Failing to Protect Their Eggs and**
 2 **Embryos.**

3 95. On March 4, 2018, Pacific Fertility discovered a loss of a substantial amount of liquid
 4 nitrogen in one of its cryogenic storage tanks, Tank 4, manufactured by Chart. This incident affected
 5 thousands of cryopreserved eggs and embryos and more than 400 individuals and families.

6 **A. Prelude and Pacific Fertility should have had systems and processes in place to**
 7 **ensure that Plaintiffs' eggs and embryos were not damaged.**

8 96. Liquid nitrogen in cryopreservation tanks evaporates at a slow rate. Absent extreme
 9 circumstances, even when a leak occurs it should take days for a tank to warm enough to cause damage
 10 to the enclosed eggs and embryos.

11 97. Egg and embryo storage facilities have developed and implemented a variety of systems
 12 and processes to protect against liquid nitrogen levels dropping to levels low enough to endanger
 13 clients' eggs and embryos. These systems and processes include daily tank inspections, multiple alarm
 14 systems that detect and send alerts regarding low liquid nitrogen levels, and autofillers that detect and
 15 automatically replenish low liquid nitrogen levels.

16 98. Pacific Fertility promised its clients that its laboratory was state of the art, including that
 17 its tanks were equipped with around-the-clock monitoring, alarm systems, and response protocols as
 18 well as daily walk-throughs. But no alarms or phone alerts notified Pacific Fertility or Prelude of the
 19 March 4 malfunction. Instead, an embryologist discovered the problem during a routine walk-through.
 20 Staff then had to manually replenish liquid nitrogen levels in the tank.

21 99. Pacific Fertility and Prelude have not explained why they did not detect the problem
 22 during prior walk-throughs or why they did not have a functional autofilling mechanism to replenish
 23 the low liquid nitrogen levels. Pacific Fertility and Prelude also lacked monitoring, alarm, and response
 24 systems and processes sufficient to detect and prevent harm from a dangerous temperature rise in Tank
 25 4. Pacific Fertility and Prelude further failed to mitigate risk by failing to implement a policy and
 26 practice of storing multiple eggs and embryos belonging to a given client in separate vials and tanks.

27 100. *Wired* interviewed one laboratory director who noted preventive measures Pacific
 28 Fertility and Prelude should have taken:

“It’s really quite sad the samples weren’t split up,” says Nahid Turan, who directs laboratory operations at the Coriell Institute for Medical Research, one of the oldest and largest biobanks in the US. “They were literally putting all the eggs in one basket.” In addition to having samples in multiple tanks at their New Jersey facility, Coriell also has back-up sites in multiple locations around the country. And its software engineers built real-time monitoring systems to flag any tanks trending in a troubling direction *before* they fail.⁷⁶

101. Cryopreserved eggs and embryos belonging to many hundreds of other people were stored in the same tank as Plaintiffs’. Tank 4 housed up to 15% of Pacific Fertility’s total cryopreserved tissue, consisting of thousands of eggs and embryos.

102. Most people with eggs and embryos stored in Tank 4 had all of their eggs and embryos stored in that single tank. Pacific Fertility has expressed regret to clients affected by the March 4 incident for not mitigating the risk by spreading their eggs and embryos across multiple tanks.

B. Chart recalled cryostorage tanks for vacuum seal defects after the Tank 4 incident.

103. On April 23, 2018, Chart, the manufacturer of Tank 4, recalled certain cryostorage tanks, stating in its recall notice: “Chart is presently investigating the possible cause of the **VACUUM LEAK AND/OR FAILURE** which may be due to inadequate adhesion of the composite neck to the aluminum unit” (emphasis in original). Chart added that the “issue appears to be an isolated occurrence involving the machine and binding agent used during the manufacturing process.”

104. Chart announced the recall four days after Pacific Fertility revealed the conclusion of “independent experts” that the March 4 incident “likely involved a failure of the tank’s vacuum seal.”

C. Multiple investigations were opened after the Tank 4 incident.

105. Various government entities and trade groups have responded to the March 4, 2018, incident. The College of American Pathologists (CAP) opened and is conducting a formal investigation into the incident, as is the State of California. The American Society for Reproductive Medicine also is studying the incident and intends to make recommendations to its members based on its findings.⁷⁷

⁷⁶ M. Molteni, *What Keeps Egg-Freezing Operations From Failing?*, Wired (Mar. 13, 2018), <https://www.wired.com/story/what-keeps-egg-freezing-operations-from-failing/>.

⁷⁷ A. E. Cha, *FAQ: Are my frozen embryos safe? Everything you need to know about the freezer malfunctions*, The Washington Post (Mar. 14, 2018), <https://www.washingtonpost.com/news/to-your->

D. Defendants' failure to keep Plaintiffs' eggs and embryos safe and secure has caused irreparable harm.

106. As a result of Defendants' conduct, Plaintiffs have suffered emotional trauma, including anxiety, hopelessness, fear, depression, devastation, and grief. Plaintiffs lost the very peace of mind they sought when availing themselves of Pacific Fertility's services, and the time, energy, and cost associated with storing their eggs and embryos have been lost as well.

107. Pacific Fertility asserts that the embryos in Tank 4 must be fully thawed to determine whether they remain viable after the incident. But, because of the risks associated with re-freezing embryos, a family must be prepared before thawing to transfer the affected embryo into a woman's uterus and attempt a pregnancy if the embryo is deemed viable. Pacific Fertility also asserts that the eggs in Tank 4 must be fully thawed and fertilized to determine whether they remain viable after the incident.

108. Pacific Fertility has agreed in some instances to thaw eggs or embryos from Tank 4, check their viability, and then refreeze the eggs or embryos. In those instances, however, Pacific Fertility has made clear that the added cycle of thawing and refreezing—resulting from its own mishandling of the eggs and embryos—creates further risks to their ultimate viability. Although this procedure would not be needed absent Defendants' failures, Pacific Fertility requires clients to sign forms purporting to waive their legal rights merely to check the viability of their tissue.

109. Some of Defendants' affected clients have decided to thaw tissue in Tank 4, and this process confirmed that their eggs or embryos are no longer viable. Many families and individuals have lost their best or only chance of having a child. They have suffered despair, depression, and heartbreak. Those who can undergo additional retrievals face a greater risk that those eggs or embryos will not lead to a successful pregnancy, as the age at which a woman's eggs are retrieved is the dominant factor for rates of success or failure.

health/wp/2018/03/14/faq-are-my-frozen-embryos-safe-everything-you-need-to-know-given-two-fertility-clinics-recent-problems/?utm_term=.86e4c34f31f3.

110. While Pacific Fertility has not shared the data it has collected regarding the number of Tank 4 eggs and embryos that have been thawed and resulting outcomes, the survival rates for these eggs and embryos is lower than it would have been had the incident not occurred.

111. Pacific Fertility has not provided a comprehensive analysis of the risks of attempting a pregnancy with any of the tissue from Tank 4, including the risks that the drop in nitrogen levels may have caused chromosomal or other defects that would not be detected from a thaw alone.

112. Nevertheless, Pacific Fertility has advised Plaintiffs A.B., C.D., and others with affected eggs and embryos to attempt pregnancies with Tank 4 tissue. Before undergoing an embryo or egg thaw, embryo transfer, or egg fertilization, Pacific Fertility requires clients to sign a consent statement acknowledging that the risks are uncertain and waiving any liability on the part of Pacific Fertility arising out of the thaw, transfer, or fertilization procedure.

113. As a result of the Tank 4 incident, Plaintiffs are being asked to make significant reproductive decisions now—depriving them of the very freedom and flexibility they sought when placing their eggs or embryos in Defendants’ care. Pacific Fertility has counseled affected clients to thaw and immediately fertilize eggs, and to transfer embryos to a woman’s uterus, to determine whether their tissue remains viable. Yet the purpose of cryopreservation was to allow these clients to make reproductive choices on their own timelines. Many clients do not yet have a partner with whom they wish to fertilize their eggs, or are not ready to move forward with a sperm donor, much less try to get pregnant now or arrange for a surrogate. Others were busy with their lives when the incident occurred—finishing graduate school, planning for international travel, or even preparing to welcome a new baby—making it impossible or highly inconvenient to attempt a pregnancy now, especially one fraught with more risk and potential heartache than normal.

114. People affected by the March 4 incident have described being thrust into a state of limbo, as the “insurance policy” they paid for has vanished. To restore their future fertility options, some are attempting additional retrieval cycles at an older age, with lower-quality eggs, and at considerable cost, burden, and disruption to their lives, subjecting them to substantial physical and emotional strain. These additional retrieval cycles also involve medical risks and potential complications. Many class members completed these cycles only to learn they were incapable of

producing sufficient or any viable eggs or embryos. Other class members, for whom additional retrievals are not possible or recommended, have been left to fear the worst—that they will be childless.

115. The National Infertility Association recognized the negative impact of the March 4 incident on women and families, stating that it was “shocked” to hear of this “unprecedented traged[y]” for “the entire family building community. Our hearts break for each person impacted. We know firsthand what someone goes through to have eggs or embryos to freeze, and to have this outcome is devastating for everyone.”⁷⁸

116. In response to a similar incident in Ohio, clinical psychologists advised that the loss of eggs and embryos should be acknowledged like any other death, and suggested grief counseling and organization of a memorial in response.⁷⁹

117. In sum, those with eggs and embryos in Tank 4 are devastated, and have compared the resulting feeling of powerlessness to that caused by a natural disaster. Many of those who had saved eggs and embryos report having lost their only chance to have biologically related children. In some cases, those affected have avoided telling family, knowing their loved ones would be “heartbroken” not to have siblings or grandchildren.⁸⁰ One couple, who had gone through the process after a cancer diagnosis, described their emotions:

My heart just sank and I felt physically ill. I felt just sick to my stomach. The world of infertility is a very isolating world, it’s very lonely[,] it’s a complete loss of control.

* * *

⁷⁸ *Statement on Storage Tank Malfunction Impacting Hundreds of Patients*, RESOLVE (Mar. 12, 2018), <https://resolve.org/about-us/news-and-press-releases/statement-on-storage-tank-malfunction-at-university-hospitals-fertility-center-in-cleveland-oh/>.

⁷⁹ J. Washington, *Experts recommend counseling & support for UH patients who lost eggs, embryos*, The Plain Dealer (Mar. 21, 2018), http://www.cleveland.com/healthfit/index.ssf/2018/03/uh_patient_who_lost_eggs_embryo.html.

⁸⁰ D. Kapp, *What It’s Like to Be a Victim of a ‘Fertility Disaster’*, The Cut (Mar. 15, 2018), <https://www.thecut.com/2018/03/pacific-fertility-center-clinic-disaster-cleveland-university-hospital.html>; S. Steimle, *Patients at Troubled San Francisco Fertility Clinic Mull Legal Action*, CBS SF Bay Area (Mar. 14, 2018), <http://sanfrancisco.cbslocal.com/2018/03/14/patients-san-francisco-fertility-clinic-mull-legal-action/>.

For some this is their last hope, I mean they physically, financially, mentally can't put themselves through that again. I've gone from anger, I've gone through just feeling a sense of loss, grief, I think right now I'm angry to be honest.⁸¹

118. Given the sensitive nature of the eggs and embryos entrusted to their care, as well as their familiarity with the deeply emotional aspects of their services, Pacific Fertility and Prelude were aware of the devastating consequences for their clients that would result from a failure to keep their eggs and embryos safe and secure.

E. Pacific Fertility and Prelude's communications regarding the incident have compounded the harm.

119. Pacific Fertility first attempted to notify its clients of the March 4 incident a week after it occurred.

120. At approximately 4 a.m. Pacific time on March 11, 2018, Pacific Fertility sent its clients an email stating:

Earlier this week, a single piece of equipment lost liquid nitrogen for a brief period of time. The remainder of the equipment and cryo-storage facility was not affected. As soon as the issue was discovered, our most senior embryologists took immediate action to secure all tissue in that single cryo-storage tank. The tank was immediately retired, and the facility is operating securely.

We have hired independent experts and launched an in-depth investigation of the matter. We felt it was imperative to advise you that your tissue was stored in the affected tank and *may* have been impacted. Based on our preliminary analysis, the good news is that we do expect that some of the tissue from that tank remains viable. We are continuing to gather information but wanted to share these developments with you directly.

121. The email further stated, "[w]e are incredibly sorry that this happened and for the anxiety that this will surely cause. We are heartbroken by this situation and our thoughts are with each of you who may have been touched by this event."

⁸¹ Mother felt "physically ill" after hearing embryos possibly destroyed at fertility center, CBS Evening News (Mar. 9, 2018), <https://www.cbsnews.com/news/mother-felt-physically-ill-after-hearing-embryos-possibly-destroyed-at-fertility-center/>.

122. The email invited Plaintiffs and other families with eggs and embryos stored in Tank 4 to call to discuss the incident with their fertility specialists. But the call center has been overwhelmed, and the information provided over the phone and in person has been vague and often inconsistent. Different Pacific Fertility staff members have provided clients with conflicting information.

123. Pacific Fertility did not provide further written information until over a month later, on April 19, 2018, when Pacific Fertility wrote to its clients with “several updates following the tank failure that occurred in the embryology lab on March 4, 2018.”

124. Pacific Fertility stated that “independent experts have been investigating the incident” and preliminarily determined that it “likely involved a failure of the tank’s vacuum seal.”

125. Pacific Fertility also stated that it had implemented new protocols—“re-inspection of onsite storage tanks, the purchase of several emergency tanks beyond our standard back-up tanks, and an extra layer of redundancy in our warning systems”—to avoid future loss of eggs and embryos, steps it should have taken before the incident.

126. Pacific Fertility initially told some clients definitively that their tissue was destroyed in the incident. It told other clients it could not determine whether their tissue survived unless they thawed and fertilized their eggs, or thawed and transferred their embryos. Pacific Fertility also refused to tell many other people whether their tissue was even stored in Tank 4, instead stating simply that an incident had occurred at its facility that may have impacted certain clients’ tissue. In post-incident calls, Pacific Fertility stated that it assumed that many were not going to use the tissue stored in Tank 4—so clients “should just let it go.” Similarly, on March 11, 2018, a Pacific Fertility employee told ABC News that a large number of families with eggs and embryos stored at the facility were “people who won’t use them anyway.” Other clients with eggs and embryos in Tank 4 were billed for storage fees after the incident occurred and before it was disclosed to them.

127. Pacific Fertility has offered some of its clients a free additional cycle for egg retrieval. Pacific Fertility’s proposed remedy is inadequate. The mishandling of client eggs and embryos is devastating and irreparable. Many can no longer undergo additional retrievals. Older women are generally not able to produce as many eggs of as high a quality as when they were younger, and in many cases go through the entire process only to learn they were unable to produce any viable eggs.

Even where some eggs can be retrieved, women confront a greater risk that those eggs will not lead to a successful transfer and pregnancy. Moreover, additional retrievals are time consuming, expensive, and physically and emotionally exhausting and burdensome, and typically require time away from work. Even two or three cycles may not fully replenish the number of viable eggs or embryos lost.

128. Pacific Fertility's April 19, 2018, email blaming the tank failure on Chart left clients with more questions than answers. Pacific Fertility did not say why the remedial steps mentioned in the email, like adding redundancies, were not in place before the incident. Clients were not told why an alarm did not alert Pacific Fertility staff, why a backup system (e.g., an autofill function or additional generator) did not engage, or why the problem went undiscovered until someone walked through the lab during a routine check.

129. Pacific Fertility states that tanks can go without power or liquid nitrogen for "several days" without compromising the enclosed reproductive tissue. It is unclear why Pacific Fertility failed to detect the problem with Tank 4 until it was too late.

130. Pacific Fertility's April 19 email also raised false hopes, stating that Pacific Fertility "can report several early pregnancies" from thawed and transferred embryos, and had "successfully thawed a limited number of eggs[,] confirm[ing] that there is viable tissue from the tank." Pacific Fertility failed to mention that there is also *unviable* tissue from the tank. Pacific Fertility indiscriminately notified all people with tissue in Tank 4 that their eggs and embryos might be "viable" despite knowing this was *not* true for many of these people.

131. Clients who were devastated upon learning, in the days and weeks after Pacific Fertility's first mass email, that their tissue was not viable have been doubly devastated by the insensitivity of Pacific Fertility's second mass email.

132. Pacific Fertility executives and employees were well aware that the March 4 incident would cause significant distress. Nevertheless, even though Pacific Fertility has a counselor on staff, it offered no additional support services or counseling to those affected by the incident.

133. Pacific Fertility's failure to offer compassionate support services and to communicate clearly and consistently with victims of the incident has caused them further confusion, pain, and distrust.

PLAINTIFF-SPECIFIC ALLEGATIONS

Plaintiffs A.B. and C.D.

134. Plaintiffs A.B. and C.D. first contacted Pacific Fertility in or around January 2015 about the possibility of creating embryos and having their embryos frozen.

135. In January 2015, Plaintiffs A.B. and C.D. contracted with Pacific Fertility to create and have their embryos preserved for future use.

136. Plaintiffs A.B. and C.D. conducted extensive research concerning IVF and fertility centers and chose Pacific Fertility based on the belief that it provided high-quality services that were state of the art. Before having their embryos cryopreserved with Pacific Fertility, Plaintiffs A.B. and C.D. saw representations about Pacific Fertility's services on Pacific Fertility's website, including Pacific Fertility's claims that it provided high-quality services. Plaintiffs A.B. and C.D. also had a consultation session with Dr. Carl M. Herbert, who told them about Pacific Fertility's care, professionalism, and state-of-the-art facilities.

137. In early 2015, Plaintiffs A.B. and C.D. underwent procedures to prepare for embryo creation and cryopreservation. Before the egg retrieval procedure in March 2015, Plaintiff A.B. underwent a month of treatment and injections. Pacific Fertility ultimately retrieved approximately 21 of her eggs, which were then fertilized with Plaintiff C.D.'s sperm. After the fertility treatment ended, the embryos Pacific Fertility created were cryopreserved for storage. At the time of the March 4, 2018, incident, Plaintiffs A.B. and C.D. had eight viable cryopreserved embryos.

138. At all relevant times, Plaintiffs A.B. and C.D.'s embryos were under Pacific Fertility's protection, custody, and control.

139. Defendants kept Plaintiffs A.B. and C.D.'s embryos within a metal storage tank—Tank 4—at their San Francisco laboratory facility on Francisco Street. Rather than mitigating the risk of tank failure by spreading Plaintiffs A.B. and C.D.'s embryos among several tanks, Defendants stored all of Plaintiffs A.B. and C.D.'s embryos in the same tank.

140. Plaintiffs A.B. and C.D. have paid approximately \$21,105.78 for the creation and storage of their embryos. They experienced severe emotional distress when they learned of the March 4, 2018, incident and in the weeks that followed.

Plaintiff E.F.

141. Plaintiff E.F. first contacted Pacific Fertility in or around May 2016 about the possibility of having her eggs frozen.

142. In or around June 2016, Plaintiff E.F. contracted with Pacific Fertility to have her eggs retrieved and preserved for potential future use.

143. Before having her eggs cryopreserved with Pacific Fertility, Plaintiff E.F. saw representations about Pacific Fertility's services on Pacific Fertility's website, including claims regarding the qualifications of Pacific Fertility's staff and the science behind the clinic's procedures. Plaintiff E.F. also met with Dr. Carolyn Givens, who told her about Pacific Fertility's use of cutting-edge technology and assured her that her eggs would be there for as long as she needed them.

144. In the summer of 2016, Plaintiff E.F. underwent procedures to prepare for egg cryopreservation. Before the retrieval procedure, she underwent two months of treatment and injections. Pacific Fertility ultimately retrieved and cryopreserved approximately nine of her eggs.

145. At all relevant times thereafter, Plaintiff E.F.'s eggs were under Pacific Fertility's protection, custody, and control.

146. Defendants kept Plaintiff E.F.'s eggs within a metal storage tank—Tank 4—at their San Francisco laboratory facility on Francisco Street. Rather than mitigating the risk of tank failure by spreading Plaintiff E.F.'s eggs among several tanks, Defendants stored all of her eggs in the same tank.

147. Plaintiff E.F. has paid approximately \$11,000 for the retrieval and storage of her eggs. She experienced severe emotional distress when she learned of the March 4, 2018, incident and in the weeks that followed.

Plaintiff G.H.

148. Plaintiff G.H. first contacted Pacific Fertility in or around February 2016 about the possibility of having her eggs frozen.

149. In or around April 2016, Plaintiff G.H. contracted with Pacific Fertility to have her eggs retrieved and preserved for potential future use.

150. Before having her eggs cryopreserved with Pacific Fertility, Plaintiff G.H. saw representations about Pacific Fertility's services on Pacific Fertility's website, including claims about

the reputable quality of their services. Plaintiff G.H. also met with Dr. Carolyn Givens, who provided information regarding Pacific Fertility's services.

151. In the spring of 2016, Plaintiff G.H. underwent procedures to prepare for egg cryopreservation. Before the retrieval procedure, she underwent two months of treatment and injections. Pacific Fertility ultimately retrieved and cryopreserved approximately two of her eggs.

152. At all relevant times thereafter, Plaintiff G.H.'s eggs were under Pacific Fertility's protection, custody, and control.

153. Defendants kept Plaintiff G.H.'s eggs within a metal storage tank—Tank 4—at their San Francisco laboratory facility on Francisco Street. Rather than mitigating the risk of tank failure by spreading Plaintiff G.H.'s eggs among several tanks, Defendants stored all of her eggs in the same tank.

154. Plaintiff G.H. has paid approximately \$14,500 for the retrieval and storage of her eggs. She experienced severe emotional distress when she learned of the March 4, 2018, incident and in the weeks that followed.

Plaintiff I.J.

155. Plaintiff I.J. first contacted Pacific Fertility in or around November 2012 about the possibility of having her eggs frozen.

156. In or around December 2012, Plaintiff I.J. contracted with Pacific Fertility to have her eggs preserved for potential future use.

157. Before having her eggs cryopreserved with Pacific Fertility, Plaintiff I.J. saw representations about Pacific Fertility's services in Pacific Fertility's brochure, including claims that Pacific Fertility "had a very strong embryo freezing program" and that its clients "can avoid high order multiple pregnancies by transferring fewer fresh embryos and successfully freezing the remaining embryos." Plaintiff I.J. also saw representations that Pacific Fertility "devoted considerable time and effort into assembling one of the most highly trained teams in the country." Plaintiff I.J. met with staff at Pacific Fertility who assured that her eggs would be there for as long as she needed them.

158. In February 2013, Plaintiff I.J. underwent procedures to prepare for egg cryopreservation. Before the retrieval procedure, she underwent two months of treatment and injections. Pacific Fertility ultimately retrieved and cryopreserved approximately 17 of her eggs.

159. At all relevant times thereafter, Plaintiff I.J.'s eggs were under Pacific Fertility's protection, custody, and control.

160. Defendants kept Plaintiff I.J.'s eggs within a metal storage tank—Tank 4—at their San Francisco laboratory facility on Francisco Street. Rather than mitigating the risk of tank failure by spreading Plaintiff I.J.'s eggs among several tanks, Defendants stored all of her eggs in the same tank.

161. Plaintiff I.J. has paid approximately \$17,000 to Defendants for procedures, medications, and storage of her eggs. She experienced severe emotional distress when she learned of the March 4, 2018, incident and in the weeks that followed.

Plaintiff K.L.

162. Plaintiff K.L. first contacted Pacific Fertility on or around June 3, 2010, about the possibility of having her eggs cryopreserved.

163. In or around December 2015, Plaintiff K.L. contracted with Pacific Fertility to have her eggs preserved for potential future use.

164. Before having her eggs frozen with Pacific Fertility, Plaintiff K.L. saw representations about Pacific Fertility's services on Pacific Fertility's website, including Pacific Fertility's claims that the clinic and its services were safe and reliable, and that eggs could be stored until the right time for the client. Plaintiff K.L. also saw Pacific Fertility's representations that the process was quick and easy for clients and had a very high likelihood of success. In addition, Plaintiff K.L. met with Dr. Eldon Schriock, who told her that storage at Pacific Fertility was safe.

165. In February 2016, Plaintiff K.L. underwent procedures to prepare for egg freezing. Before the retrieval procedure, she underwent months of treatment and injections. She also had to take several days off from work and could not travel for work for two weeks. Pacific Fertility ultimately retrieved and froze five of her eggs.

166. At all relevant times thereafter, Plaintiff K.L.'s eggs were under Pacific Fertility's protection, custody, and control.

167. Defendants kept Plaintiff K.L.'s eggs from her first cycle within a metal storage tank—Tank 4—at their San Francisco laboratory facility on Francisco Street. Rather than mitigating the risk

1 of tank failure by spreading Plaintiff K.L.'s eggs from that cycle among several tanks, Defendants
2 stored all of her eggs in the same tank.

3 168. Plaintiff K.L. has paid approximately \$12,000 to Defendants for procedures
4 (approximately \$9,300), medications (approximately \$1,200), and storage (approximately \$600 per
5 year) of her eggs. She experienced severe emotional distress when she learned of the March 4, 2018,
6 incident and in the weeks that followed.

7 **Plaintiffs M.N. and O.P.**

8 169. Plaintiff M.N. first contacted Pacific Fertility in or around September 2011 about the
9 possibility of having her eggs frozen.

10 170. In or around late 2011, Plaintiff M.N. contracted with Pacific Fertility to have her eggs
11 preserved for potential future use.

12 171. Before having her eggs frozen with Pacific Fertility, Plaintiff M.N. saw representations
13 about Pacific Fertility's services on its website, including claims regarding its success rates and ability
14 to help couples and single people have a family and plan for the future. Plaintiff M.N. also met with
15 Dr. Eldon Schriock, who told her about Pacific Fertility's statistics and success rates.

16 172. In January 2012, Plaintiff M.N. underwent procedures to prepare for egg freezing. She
17 went through months of invasive and time-consuming treatments, including injections, blood tests, and
18 ultrasounds. She underwent approximately three retrieval cycles, resulting in approximately 37 eggs.

19 173. In 2016, Plaintiff M.N. contracted with Defendants to fertilize half of her eggs with a
20 sperm donor, resulting in three high-quality embryos. Her remaining 15 eggs were stored in Tank 4.

21 174. At all relevant times thereafter, Plaintiff M.N.'s remaining eggs were under Pacific
22 Fertility's protection, custody, and control.

23 175. Defendants kept Plaintiff M.N.'s eggs within a metal storage tank—Tank 4—at their
24 San Francisco laboratory facility on Francisco Street. Rather than mitigating the risk of tank failure by
25 spreading Plaintiff M.N.'s eggs among several tanks, Defendants stored all of her eggs in the same
26 tank.

27 176. After Plaintiff M.N. finally met the right partner, O.P., they decided to move ahead with
28 fertilizing the rest of her eggs. Plaintiffs M.N. and O.P. are in a committed relationship and plan to

raise children together. O.P. also became a client of Pacific Fertility in December 2017, when he and M.N. consulted with Pacific Fertility to begin the process of fertilizing M.N.'s remaining eggs with O.P.'s sperm. In consultation with Pacific Fertility specialists, M.N. and O.P. decided to proceed with the fertilization by mid-2018.

177. Plaintiff M.N. has paid more than \$25,000 to Defendants for procedures, medications, and storage of her eggs. The process was mentally and physically draining: Plaintiff M.N. had approximately 70 blood tests, 30 ultrasounds, and numerous injections and prescriptions. The process was also time consuming and required her to take time off from work. Plaintiffs M.N. and O.P. experienced severe emotional distress when they learned of the March 4, 2018, incident and in the weeks that followed.

* * *

178. As described above, each Plaintiff encountered specific representations by Pacific Fertility and/or Prelude regarding their egg and embryo storage services. All Plaintiffs encountered materially similar pre-treatment materials provided by Pacific Fertility.

179. At all relevant times before the incident, the oral representations and promotional and contractual materials regarding egg and embryo cryopreservation services that Plaintiffs and, inferentially, the class members received, were standardized, common, and essentially uniform.

180. Despite (1) knowledge that their electronic monitoring and alarms, and accompanying response systems and/or processes, were inadequate to protect against damage to Plaintiffs' eggs and embryos, and (2) multiple opportunities to inform Plaintiffs of the true condition of such systems and processes before Plaintiffs purchased and used their storage services, Pacific Fertility and Prelude uniformly failed to disclose to any Plaintiff that their systems were inadequate.

181. Had Defendants disclosed that their storage monitoring and alarm systems were deficient, nonfunctional, and/or incapable of protecting eggs and embryos during a tank failure, Plaintiffs would not have purchased and used Defendants' egg and embryo storage services.

CLASS ACTION ALLEGATIONS

182. Plaintiffs propose that the Court streamline the determination of common claims or issues in this case, as Defendants' misconduct leading to a single incident—the failure in Tank 4—has

affected hundreds of people at once. To facilitate such efforts through the joint trial of common questions, Plaintiffs propose certification of the following class, pursuant to Rule 23 of the Federal Rules of Civil Procedure:

All individuals, and their reproductive partners, who had eggs, embryos, or other material in Tank 4 at Pacific Fertility Center in San Francisco, California on March 4, 2018.

Excluded from this class are Defendants, their affiliates and subsidiaries, and their officers, directors, partners, employees, and agents; class counsel, employees of class counsel's firms, and class counsel's immediate family members; defense counsel, their employees, and their immediate family members; and any judicial officer who considers or renders a decision or ruling in this case, their staff, and their immediate family members.

183. Numerosity. The members of the class are so numerous that their individual joinder is impracticable. There are at least 400 class members, whose names and addresses are readily available from Defendants' records.

184. Existence and Predominance of Common Questions of Fact and Law. This action involves common questions of law and fact that predominate over any questions affecting individual class members, including, without limitation:

- a. Whether Tank 4 was defective;
- b. Whether Defendants owed a duty to Plaintiffs and class members to protect the eggs and embryos they entrusted to Defendants' care;
- c. Whether that duty was non-delegable;
- d. Whether Defendants breached their duties to protect the eggs and embryos that Plaintiffs and class members entrusted to their care;
- e. Whether the March 4, 2018, loss of liquid nitrogen in a tank at Defendants' San Francisco facility resulted from Defendants' negligence or other wrongful conduct;
- f. Whether Defendants failed to take adequate and reasonable measures to ensure that their systems were protected;

g. Whether Defendants failed to take available steps to ensure that liquid nitrogen levels in their storage tanks would remain sufficient;

h. Whether Defendants breached their contracts with Plaintiffs and class members;

i. Whether Defendants fraudulently concealed material information regarding their laboratory practices and procedures;

j. The type(s) and measure(s) of compensable and other redressable injury incurred by Plaintiffs and class members as a result of Defendants' conduct alleged herein; and

k. What measures are necessary to ensure that eggs and embryos stored at Pacific Fertility are properly safeguarded in the future.

185. Typicality. Plaintiffs' claims are typical of the other class members' claims because Plaintiffs and class members were subjected to the same wrongful conduct and damaged in the same way by having their eggs and embryos destroyed, damaged, or jeopardized.

186. Adequacy of Representation. Plaintiffs are adequate class representatives. Their interests do not conflict with the interests of the other class members they seek to represent. Plaintiffs have retained counsel competent and experienced in complex class action litigation, as well as in matters concerning egg and embryo loss, and they intend to prosecute this action vigorously. Plaintiffs and their counsel will fairly and adequately pursue and protect the interests of the class.

187. Superiority. A class action is superior to all other available means for the fair and efficient adjudication of this controversy. The highly sensitive and private nature of the facts involved here, as well as the fear that bringing an individual suit could affect future treatment at Pacific Fertility, counsels toward providing a class vehicle to adjudicate these claims. The damages or other financial detriment suffered by Plaintiffs and the other class members are relatively small compared to the burden and expense that would be required to individually litigate these claims. As a result, it would be impracticable for class members to seek redress individually. Individualized litigation would also create a potential for inconsistent or contradictory judgments and increase the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management

difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

CLAIMS FOR RELIEF

188. Plaintiffs bring each of the following claims under California law.

189. None of Plaintiffs' claims involves any allegation of medical malpractice.

FIRST CAUSE OF ACTION **Negligence and/or Gross Negligence** **(Against All Defendants)**

190. Plaintiffs incorporate the above and below allegations by reference.

191. Defendants owed Plaintiffs a duty to exercise the highest degree of care when maintaining, inspecting, monitoring, and testing the liquid nitrogen storage tanks used for the preservation of eggs and embryos at Defendants' San Francisco laboratory.

192. Defendants owed a duty of care to Plaintiffs to act reasonably in all aspects of the storage of Plaintiffs' eggs and embryos so as to avoid destroying them, damaging them, or jeopardizing their viability given that doing so would inevitably lead to emotional distress.

193. Defendants assumed that duty of care through communications with actual and prospective clients and by reason of Defendants' special relationship with Plaintiffs arising from the sensitive services Defendants undertook to perform: human egg and embryo cryopreservation and storage.

194. Plaintiffs' harms occurred in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious harm. As Pacific Fertility states in its marketing, fertility services, including those relating to cryopreserved egg and embryo storage, can be stressful and overwhelming for those who use them.

195. It was reasonably foreseeable to Defendants that Plaintiffs would experience severe emotional distress as a result of Defendants' breach of their duty of care.

196. Defendants' carelessness and negligence directly and foreseeably damaged Plaintiffs. Plaintiffs entrusted Defendants with preserving and storing their eggs and embryos, and Defendants' mishandling of those eggs and embryos, and their subsequent mishandling of communications,

1 naturally and foreseeably caused mental anguish and emotional distress, among other injuries, to
2 Plaintiffs.

3 197. There was a close connection between Defendants' conduct and Plaintiffs' injuries.
4 Plaintiffs' emotional distress and other harms occurred because of Defendants' failure to act reasonably
5 in all aspects of the storage of Plaintiffs' eggs and embryos.

6 198. Plaintiffs entrusted Defendants to use reasonable care to safeguard their eggs and
7 embryos to preserve their reproductive options. Defendants' carelessness with this precious material,
8 and ultimately, with the affected families' careful plans for parenthood, is reprehensible.

9 199. Imposing a duty on Defendants to avoid causing emotional distress would promote the
10 policy of preventing future harm, insofar as they will be motivated to: (1) in the case of Prelude and
11 Pacific Fertility, implement more effective processes and systems to ensure that eggs and embryos are
12 safeguarded and properly stored going forward; and (2) in the case of Chart, take steps to ensure that
13 tanks it designs to hold eggs and embryos are free from defects capable of destroying, damaging, or
14 jeopardizing their contents. Imposing a duty on Defendants to avoid causing emotional distress also
15 furthers the community's interest in ensuring that reliable fertility services are available to those who
16 wish to become parents.

17 200. The burden on Defendants from a duty to avoid causing emotional distress is fair and
18 appropriate, in light of the importance of the eggs and embryos they voluntarily agreed to protect, at
19 considerable cost to Plaintiffs.

20 201. Defendants owed Plaintiffs a non-delegable duty of care with respect to the maintenance
21 and protection of the eggs and embryos entrusted to their care.

22 202. Defendants breached these duties and acted with negligence and gross negligence in at
23 least the following respects:

24 a. failing to adequately design, manufacture, maintain, inspect, monitor, and/or test
25 their liquid nitrogen storage tanks, including through a functional electronic tank monitoring system
26 capable of detecting a rise in temperature or a drop in liquid nitrogen levels and promptly alerting staff
27 to the immediate problem;

- b. permitting a leakage or tank failure to occur with respect to one of their liquid nitrogen storage tanks—Tank 4—containing human eggs and embryos;
- c. failing to inspect and/or adequately inspect Tank 4 on a daily basis;
- d. failing to establish, maintain, and properly activate alarms;
- e. failing to establish, maintain, and properly activate autofill devices and/or generator systems;
- f. failing to disclose that it did not have appropriate processes and systems in place to protect clients' eggs and embryos;
- g. failing to properly safeguard the eggs and embryos in its care; and
- h. failing to follow reasonable scientific and laboratory procedures for safeguarding the eggs and embryos in their care.

203. Defendants' acts and omissions constitute gross negligence, because they constitute an extreme departure from what a reasonably careful person would do in the same situation to prevent foreseeable loss of eggs and embryos.

204. Defendants acted willfully, wantonly, and with conscious and reckless disregard for the rights and interests of Plaintiffs. Defendants' acts and omissions had a great probability of causing significant harm and in fact did.

205. Defendants' failure to appropriately handle and safeguard Plaintiffs' eggs and embryos has caused severe emotional distress, regardless of whether it is ever determined conclusively that the eggs and embryos in Tank 4 are not viable. Defendants' misconduct has irreparably breached trust and caused uncertainty, anxiety, and fear among Plaintiffs and other affected families over how to proceed without being informed as to the long-term effects from an egg or embryo's presence in Tank 4 during the incident.

206. As a proximate result of Defendants' negligence and/or gross negligence, Plaintiffs suffered harm in an amount to be determined at trial, including severe emotional distress consisting of shock, fright, horror, anguish, suffering, grief, anxiety, nervousness, embarrassment, humiliation, and shame. A reasonable person would be unable to cope with the losses suffered by Plaintiffs.

SECOND CAUSE OF ACTION
Breach of Contract
(Against Pacific Fertility and Prelude)

207. Plaintiffs incorporate the above allegations by reference.

208. Defendants entered into contracts with Plaintiffs, under which Defendants agreed to store and preserve their eggs and embryos or those obtained on their behalf, and under which Defendants assumed a non-delegable duty of care to ensure such safekeeping and preservation.

209. A contract involving egg and embryo storage and preservation is highly personal and implicates vital concerns regarding parenthood, procreation, and assisting others in achieving their family plans.

210. In consideration of Defendants' promises, including to keep the eggs and embryos safe and secure by following practices and protocols, including as outlined on their websites and in other marketing materials, Plaintiffs agreed to pay, and did pay, substantial sums for the services rendered.

211. Plaintiffs performed all of the terms and conditions required of them under their contracts with Defendants.

212. Based on the conduct described herein, Defendants breached their contracts with Plaintiffs, including the incorporated contractual covenant of good faith and fair dealing. Defendants' failure to safely store and preserve Plaintiffs' eggs and embryos violated commercial norms, deprived Plaintiffs of the fruits of the contracts, and contravened their objectively reasonable expectations under the contracts.

213. A contract whereby a fertility clinic undertakes to store human eggs and embryos is one as to which it is reasonably foreseeable that breach thereof will cause mental anguish to the person or persons who entrusted the clinic with such material.

214. As a direct and proximate result of Defendants' breach of contract, Plaintiffs suffered harm, including mental anguish, in an amount to be determined at trial.

THIRD CAUSE OF ACTION
Bailment
(Against Pacific Fertility and Prelude)

215. Plaintiffs incorporate the above allegations by reference.

216. Plaintiffs delivered to Defendants for safekeeping irreplaceable personal property to be safely and securely kept for the benefit of Plaintiffs, and to be redelivered to them upon demand.

217. Defendants received eggs and embryos from Plaintiffs on this condition.

218. Plaintiffs agreed to pay, and did pay, substantial sums in exchange for Defendants' promise to safeguard their eggs and embryos for the benefit of Plaintiffs.

219. Defendants had a duty to exercise care in maintaining, preserving, and protecting Plaintiffs' eggs and embryos that were delivered to Defendants. Further, Defendants had a duty to return the eggs and embryos, undamaged, to Plaintiffs, to whom the eggs and embryos belonged.

220. Defendants invited the general public, including Plaintiffs, to entrust eggs and embryos to Defendants' care by holding out Pacific Fertility as a competent, capable, and established reproductive and storage facility able to handle and care for eggs and embryos in a safe and satisfactory manner, and in a manner specified on their websites.

221. Because of Defendants' wrongful conduct, as set forth herein, the irreplaceable property of Plaintiffs was irreplaceably damaged, precluding its redelivery to them as provided for under the bailment contract.

222. Defendants breached their duty to exercise care in the safekeeping of Plaintiffs' eggs and embryos delivered to Defendants and to return the eggs and embryos, undamaged, to Plaintiffs.

223. As a direct and proximate result of Defendants' breach of bailment contract, Plaintiffs have been deprived of the opportunity to use the eggs and embryos they entrusted to Defendants, and have suffered damages in an amount to be determined at trial.

FOURTH CAUSE OF ACTION
Premises Liability
(Against Pacific Fertility and Prelude)

224. Plaintiffs incorporate the above allegations by reference.

225. At all relevant times, Pacific Fertility and Prelude owned, leased, and/or occupied the property, premises, machinery, and equipment, including Tank 4, on the premises at 55 Francisco Street, Suite 500, San Francisco, California 94133.

226. At all relevant times, Pacific Fertility and Prelude had a duty to use reasonable care to keep Plaintiffs' irreplaceable personal property in a reasonably safe condition and free from defects that would cause injury or harm to Plaintiffs' stored eggs and embryos.

227. At all relevant times, Pacific Fertility and Prelude knew, or by reasonable inspection and monitoring should have known, of the defective condition of the premises, and specifically of Tank 4.

228. At all relevant times, Pacific Fertility and Prelude were careless and negligent in the ownership, management, control and maintenance of the aforementioned real property, such that Plaintiffs, whose cryopreserved eggs and embryos were entrusted to Pacific Fertility and Prelude's care, were harmed.

229. By reason of the foregoing, and as a direct and legal cause thereof, Plaintiffs have suffered injury, loss, harm, and damages.

FIFTH CAUSE OF ACTION

Breach of Fiduciary Duty – Failure to Use Reasonable Care (Against Pacific Fertility and Prelude)

230. Plaintiffs incorporate the above allegations by reference.

231. At all times herein mentioned, Pacific Fertility and Prelude were the fiduciaries of Plaintiffs because they agreed to store, safeguard, secure, maintain, and account for Plaintiffs' eggs and embryos and because they represented that they were experts in the field of maintenance and protection of eggs and embryos.

232. Pacific Fertility and Prelude acted on Plaintiffs' behalf for purposes of the maintenance and protection of Plaintiffs' eggs and embryos.

233. Pacific Fertility and Prelude failed to act as a reasonably careful fiduciary would have acted under the same or similar circumstances with respect to the maintenance and protection of the eggs and embryos entrusted to their care.

234. Pacific Fertility and Prelude's breach of fiduciary duty was a substantial factor in causing harm to Plaintiffs.

SIXTH CAUSE OF ACTION

**Violations of the Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et seq.*
(Against All Defendants)**

235. Plaintiffs incorporate the above allegations by reference.

236. The UCL prohibits acts of “unfair competition,” including any “unlawful, unfair or fraudulent business act or practice.”

237. Defendants’ conduct set forth herein is unlawful because it constitutes negligence, gross negligence, breach of contract, bailment, breach of fiduciary duty, deceit, and strict products liability.

238. Defendants’ conduct is unfair because it is immoral, unethical, unscrupulous, oppressive, and substantially injurious. Plaintiffs entrusted Defendants with their eggs and embryos to preserve their options for procreation, parenting, or assisting others experiencing infertility.

Defendants breached that trust by, among other things:

a. failing to adequately design, manufacture, maintain, inspect, monitor, and/or test their liquid nitrogen storage tanks, including through a functional electronic tank monitoring system capable of detecting a rise in temperature or a drop in liquid nitrogen levels and promptly alerting staff to the immediate problem;

b. permitting a leakage or tank failure to occur with respect to one of their liquid nitrogen storage tanks—Tank 4—containing human eggs and embryos;

c. failing to inspect and/or adequately inspect Tank 4 on a daily basis;

d. failing to establish, maintain, and properly activate alarms;

e. failing to establish, maintain, and properly activate autofill devices and/or generator systems;

f. failing to disclose that it did not have appropriate processes and systems in place to protect clients’ eggs and embryos;

g. failing to properly safeguard the eggs and embryos in its care; and

h. failing to follow reasonable scientific and laboratory procedures for safeguarding the eggs and embryos in their care.

239. The gravity of the harm resulting from Defendants' conduct far outweighs any conceivable utility of this conduct. There are reasonably available alternatives that would further Defendants' legitimate business interests, such as implementing reasonable protocols and procedures, as promised, to prevent a catastrophic failure.

240. Plaintiffs could not have reasonably avoided injury from Defendants' unfair conduct. Plaintiffs did not know, and had no reasonable means of learning, that Defendants were not adequately safeguarding the eggs and embryos in their custody and control.

241. Defendants' conduct also is fraudulent in violation of the UCL because it is likely to deceive a reasonable consumer.

242. Defendants knowingly and intentionally concealed from Plaintiffs that their electronic monitoring and alarm and response systems and processes, and other equipment, including the storage tank, were inadequate to protect against damage to Plaintiffs' eggs and embryos.

243. Defendants volunteered specific information to Plaintiffs through advertising, on websites, and in documents that their storage services were high quality, including representing that a tank could go without power or liquid nitrogen for "several days" without damaging the tissue it contained. Plaintiffs viewed and relied upon Defendants' representations that their storage services were high quality, safe, and reliable.

244. Defendants made these specific representations despite knowing their systems were inadequate to protect against damage to Plaintiffs' eggs and embryos.

245. Defendants had ample means and opportunities to alert Plaintiffs to the fact that their electronic monitoring and alarm and response systems and processes were inadequate to protect against damage to Plaintiffs' eggs and embryos. Defendants failed to disclose such inadequacies to Plaintiffs. Had Defendants disclosed such inadequacies to Plaintiffs, Plaintiffs would not have purchased Defendants' egg and embryo storage services.

246. Defendants were under a duty to disclose that their storage systems and processes were inadequate given their exclusive knowledge of the inadequacies and because they made partial representations about their storage services without disclosing the inadequacies.

247. As a direct and proximate result of Defendants' unlawful and unfair conduct, Plaintiffs have suffered injuries in fact and seek appropriate relief under the UCL, including injunctive relief and restitution.

248. The requested injunction under the UCL will primarily benefit the interests of the general public. It will have the primary purpose and effect of prohibiting unlawful acts that threaten injury to members of the public who have placed, or who in the future will place, reproductive tissue under Defendants' care.

SEVENTH CAUSE OF ACTION

Violations of the Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* (Against Pacific Fertility and Prelude)

249. Plaintiffs incorporate the above allegations by reference.

250. Pacific Fertility and Prelude are "persons" as defined by Civil Code §§ 1761(c) and 1770 and have provided "services" as defined by Civil Code §§ 1761(b) and 1770.

251. Plaintiffs are "consumers" as defined by Civil Code §§ 1761(d) and 1770 and have engaged in "transaction[s]" as defined by Civil Code §§ 1761(e) and 1770.

252. Pacific Fertility and Prelude's acts and practices were intended to and did result in the sale of services to Plaintiffs, and those acts and practices violated Civil Code § 1770, including by:

- a. representing that their services had characteristics, uses, and benefits that they did not have;
- b. representing that their services were of a particular standard, quality, or grade, when they were not;
- c. advertising services with intent not to sell them as advertised; and
- d. representing that the subject of a transaction had been supplied in accordance with a previous representation when it had not.

253. Pacific Fertility and Prelude's acts and practices violated the Consumers Legal Remedies Act by failing to disclose information in the context of transactions.

254. Pacific Fertility and Prelude knew that their equipment, systems, and processes, including Defendants' storage tank, electronic monitoring, alarm, and response systems and processes, were inadequate to safely store Plaintiffs' eggs and embryos.

255. Pacific Fertility and Prelude were under a duty to disclose that their equipment, systems, and processes were inadequate because they actively concealed this information and because they had exclusive knowledge, not known or reasonably accessible to Plaintiffs, of the inadequacy of their equipment, systems, and processes. They were also subject to a duty to disclose because the information they failed to disclose was contrary to partial representations they made concerning the adequacy of their equipment, systems, and processes.

256. Pacific Fertility and Prelude had ample means and opportunities to alert Plaintiffs to the fact that their equipment, systems, and processes were inadequate, including in person when meeting with Plaintiffs before egg and embryo storage. Despite their opportunities to do so, Pacific Fertility and Prelude failed to disclose to Plaintiffs, and actively concealed, that Defendants' equipment, systems, and processes were inadequate to safely store human reproductive tissue.

257. Pacific Fertility and Prelude's omissions were material because reasonable consumers would consider important, and would want to be told, information about the inadequacy of Defendants' equipment, systems, or processes connected to their ability to safely store Plaintiffs eggs and embryos.

258. As a direct and proximate result of this conduct, Plaintiffs have suffered damage. Had Defendants not misrepresented the adequacy of, and concealed the inadequacy of, their equipment, systems, and processes, Plaintiffs would not have purchased Defendants' services and would not have gone through the time and emotional investment to store their reproductive tissue with Defendants. In the meantime, Pacific Fertility and Prelude generated more revenue than they otherwise would have, unjustly enriching themselves.

259. Plaintiffs are entitled to equitable relief, reasonable attorneys' fees and costs, declaratory relief, and a permanent injunction enjoining Pacific Fertility and Prelude from their unlawful, fraudulent, and deceitful activity.

260. Pursuant to Cal. Civ. Code § 1782(a), Plaintiffs will send letters to Defendants notifying them of their CLRA violations and providing them with the opportunity to correct their business

practices. If Pacific Fertility and Prelude do not correct their business practices, Plaintiffs will amend (or seek leave to amend) the complaint to add claims for monetary relief, including for actual, restitutionary, emotional distress, and punitive damages under the CLRA.

261. The conduct of Pacific Fertility and Prelude set forth herein was reprehensible and subjected Plaintiffs to cruel and unjust hardship in conscious disregard of their rights, constituting oppression, for which Pacific Fertility and Prelude must be punished by punitive and exemplary damages in an amount according to proof. Pacific Fertility and Prelude's behavior evidences a conscious disregard for the safety of the eggs and embryos entrusted to them, and by extension, those who placed the eggs and embryos in their care, including Plaintiffs. Pacific Fertility and Prelude's conduct was and is despicable conduct and constitutes malice under Section 3294 of the California Civil Code. An officer, director, or managing agent of Pacific Fertility and Prelude personally committed, authorized, and/or ratified the reprehensible conduct set forth herein. Plaintiffs are entitled to an award of punitive damages sufficient to punish and make an example of these Defendants.

EIGHTH CAUSE OF ACTION
Deceit and Fraudulent Concealment
(Against Pacific Fertility and Prelude)

262. Plaintiffs incorporate the above allegations by reference.

263. Defendants marketed and promoted their services and made representations to the public and to Plaintiffs that they were experts in cryopreservation, had state-of-the-art facilities, and would safely preserve and store Plaintiffs' eggs and embryos in liquid nitrogen according to certain protocols and standards until they were ready to use them.

264. Defendants' representations were false, and Defendants either knew the truth or made the representations without regard for the truth.

265. Defendants intended for Plaintiffs to rely on their representations and engage Defendants to perform services to preserve Plaintiffs' eggs and embryos, and Plaintiffs reasonably relied on Defendants' representations when availing themselves of Defendants' services for egg and embryo storage.

266. Defendants intentionally suppressed and concealed material facts concerning the adequacy of its storage systems and processes. Defendants knew or reasonably should have known their electronic monitoring and alarm storage systems and processes were inadequate to protect against damage to Plaintiffs' eggs and embryos. Though it is standard in the industry to do so, Defendants did not equip Tank 4 with a liquid nitrogen autofilling system sufficient to replenish declining liquid nitrogen levels. Defendants willfully omitted to disclose the inadequate nature of its storage systems and processes to Plaintiffs.

267. Plaintiffs had no reasonable means of knowing Defendants' storage systems and processes were inadequate, or that Defendants' representations about such systems were incomplete, false, or misleading in that they failed to disclose such inadequacies. Plaintiffs did not and reasonably could not have discovered Defendants' deception prior to purchasing their storage services.

268. Defendants had ample means and opportunities to alert Plaintiffs to the fact that their electronic monitoring and alarm and response systems and processes were inadequate to protect against damage to Plaintiffs' eggs and embryos. Defendants willfully failed to disclose such inadequacies to Plaintiffs. Had Defendants disclosed the inadequacies to Plaintiffs, they would not have purchased Defendants' egg and embryo storage services.

269. Defendants were under a duty to disclose that their storage systems and processes were inadequate given their exclusive knowledge of the inadequacies and because they made partial representations about their storage services without disclosing the inadequacies.

270. Plaintiffs reasonably relied to their detriment upon Defendants' material omissions regarding the adequacy of their storage systems and processes. Plaintiffs were unaware of the omitted material facts and would not have acted as they did had these facts been disclosed. Had Plaintiffs known that Defendants' storage systems and processes were inadequate to protect against damage to their eggs and/or embryos, they would not have purchased such services.

271. Plaintiffs sustained damage as a direct and proximate result of Defendants' deceit and fraudulent concealment.

272. The foregoing acts and omissions of Defendants were committed maliciously, oppressively, deliberately, with intent to defraud, and in reckless disregard of Plaintiffs' rights,

interests, and well-being to enrich Defendants. Defendants' conduct warrants an assessment of punitive damages in an amount sufficient to deter such conduct in the future, which amount is to be determined according to proof.

NINTH CAUSE OF ACTION
Strict Products Liability – Failure to Warn
(Against Chart)

273. Plaintiffs incorporate the above allegations by reference.

274. Chart manufactured, distributed, and/or sold the cryogenic equipment used at Pacific Fertility, including Tank 4.

275. The cryogenic storage tank at issue had potential risks that were known or knowable in light of the scientific and medical knowledge that was generally accepted in the scientific and medical community at the time of the manufacture, distribution, or sale of the cryogenic storage Tank 4.

276. The cryogenic storage Tank 4 was defective and unreasonably dangerous when it left Chart's possession because it did not contain adequate warnings, including warnings concerning certain risks, including the risk of defective seals that may result in catastrophic nitrogen loss, the risk of nitrogen loss and prevalence of this occurrence, the risk of a rise in temperature and the fact that the tanks are not equipped with sufficient alarms to notify users of catastrophic nitrogen loss or a rise in temperature that can damage and/or cause destruction of eggs or embryos, the rate of failure of the cryogenic storage tanks in the preservation of eggs or embryos or other human tissue, and the need for maintenance, inspection, and/or replacement of the cryogenic storage tanks.

277. The potential risks presented a substantial danger when the cryogenic storage tank at issue was used or misused in an intended or reasonably foreseeable way.

278. The ordinary consumer would not have recognized the potential for risks.

279. Chart had constructive notice or knowledge and knew, or in the exercise of reasonable care, should have known that the cryogenic storage Tank 4 was dangerous, had risks, and/or was defective in manufacture and/or design, including that it could cause nitrogen loss and would damage and/or cause the destruction of cryopreserved materials, including eggs or embryos.

280. Chart failed to adequately warn or instruct concerning the potential risks of the cryogenic storage tank.

281. It was foreseeable to Chart that failure to adequately warn about the risks of its cryogenic storage tank would cause irreparable harm to those whose eggs and embryos were cryopreserved therein, including the types of emotional distress suffered by Plaintiffs.

282. As a result of Chart's failures to adequately warn, Plaintiffs were harmed as described herein, regardless of whether it is ever determined conclusively that certain eggs and embryos in Tank 4 are not viable. The lack of sufficient instructions and warnings was a substantial factor in causing Plaintiffs' harm.

TENTH CAUSE OF ACTION
Strict Products Liability – Manufacturing Defect
(Against Chart)

283. Plaintiffs incorporate the above allegations by reference.

284. Chart manufactured, distributed, and/or sold the cryogenic storage Tank 4.

285. The cryogenic storage tank contained a manufacturing defect when it left Chart's possession.

286. Chart had constructive notice or knowledge and knew, or in the exercise of reasonable care, should have known that the cryogenic storage tanks were dangerous, had risks, and/or were defective in manufacture, including that they could cause nitrogen loss and would damage and/or cause the destruction of cryopreserved materials, including eggs or embryos.

287. As a result of Chart's conduct, Plaintiffs were harmed as described herein, regardless of whether it is ever determined conclusively that certain eggs and embryos in Tank 4 are not viable.

288. The defective nature of the cryogenic storage tank was a substantial factor in causing Plaintiffs' harm.

ELEVENTH CAUSE OF ACTION
Strict Products Liability — Design Defect — Consumer Expectations Test
(Against Chart)

289. Plaintiffs incorporate the above allegations by reference.

290. Chart manufactured, distributed, and/or sold the cryogenic storage Tank 4.

291. The cryogenic storage tank did not perform as safely as an ordinary consumer would have expected it to perform when used in an intended or reasonably foreseeable way.

292. Chart had constructive notice or knowledge and knew, or in the exercise of reasonable care, should have known that the cryogenic storage tanks were dangerous, had risks, and/or were defective, including in design, including that they could result in nitrogen loss and would damage and/or cause the destruction of cryopreserved materials, including eggs or embryos.

293. As a result of Chart's conduct, Plaintiffs were harmed as described herein, regardless of whether it is ever determined conclusively that certain eggs and embryos in Tank 4 are not viable.

294. The cryogenic storage tank's failure to perform safely was a substantial factor in causing Plaintiffs' harm.

TWELFTH CAUSE OF ACTION
Strict Products Liability – Design Defect – Risk-Utility Test
(Against Chart)

295. Plaintiffs incorporate the above allegations by reference.

296. Chart manufactured, distributed, and/or sold the cryogenic storage Tank 4.

297. The benefits of this tank's design are not outweighed by its risks, considering the gravity of the potential harm resulting from the use of the tank, the likelihood that the harm would occur, the feasibility of an alternative safer design at the time of manufacture, and the disadvantages of an alternative design.

298. Chart had constructive notice or knowledge and knew, or in the exercise of reasonable care, should have known that the cryogenic storage tanks were dangerous, had risks, and/or were defective in design, including that they could result in nitrogen loss and would damage and/or cause the destruction of cryopreserved materials, including eggs or embryos.

299. Plaintiffs were harmed because the tank lost liquid nitrogen.

300. Chart's design of the tank was a substantial factor in causing Plaintiffs' harm.

THIRTEENTH CAUSE OF ACTION
Negligent Failure to Recall
(Against Chart)

301. Plaintiffs incorporate the above allegations by reference.

302. Chart acted negligently by failing to recall, prior to the incident of March 4, 2018, the line of tanks that included Tank 4.

303. Chart manufactured, distributed, and/or sold this line of tanks.

304. Chart knew or reasonably should have known that, when used as intended, Tank 4 presented or was likely to present a danger to eggs and embryos. Chart knew or reasonably should have known that the vacuum seal on Tank 4 was vulnerable to breach, and that upon such breach liquid nitrogen levels would drop, causing the eggs and embryos stored inside the tank to reach dangerously elevated temperatures.

305. After Chart sold Tank 4 to Pacific Fertility and before March 4, 2018, Chart knew or reasonably should have known that the tank was susceptible to its vacuum seal breaking. Nevertheless, at no point during this time period did Chart recall, repair, or warn of the danger posed by the tank.

306. A reasonable manufacturer, distributor, or seller facing the same or similar circumstances as Chart would have recalled Tank 4 to ensure eggs and embryos were not endangered.

307. Chart's failure to timely recall Tank 4 was a substantial factor in causing harm to Plaintiffs. Had Chart recalled Tank 4 before the incident, the other Defendants would not have used it, and it would not have failed while Plaintiffs' eggs and embryos were stored within it.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the class defined above, respectfully request that the Court:

A. Certify the class under Fed. R. Civ. P. 23(a), (b)(1), (b)(2), (b)(3), and/or (c)(4), as appropriate; appoint Plaintiffs as representatives of the class; and appoint the undersigned counsel as class counsel;

B. Award Plaintiffs compensatory, restitutionary, rescissory, general, consequential, punitive and/or exemplary damages in an amount to be determined at trial;

C. Award prejudgment interest as permitted by law;

D. Enter an injunction against Defendants and their officers, agents, successors, employees, representatives, assigns, and any and all persons acting in concert with them, to ensure Defendants' compliance with California Business and Professions Code section 17200 *et seq.*;

E. Enter an injunction against Defendants and their officers, agents, successors, employees, representatives, assigns, and any and all persons acting in concert with them, mandating that Defendants cease engaging in unfair competition as set forth above;

F. Appoint a monitor to ensure Defendants comply with the injunctive provisions of any decree of this Court;

G. Retain jurisdiction over this action to ensure Defendants comply with such a decree;

H. Enter other appropriate equitable relief;

I. Award reasonable attorneys' fees and costs, as provided for by law; and

J. Grant such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all issues so triable.

Dated: May 30, 2018

Respectfully submitted,

By: /s/ Adam E. Polk

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Plaintiffs' Counsel

ATTESTATION

I, Adam E. Polk, am the ECF User whose identification and password are being used to file this Consolidated Amended Class Action Complaint. Pursuant to Civil L.R. 5-1(i)(3), I attest under penalty of perjury that concurrence in this filing has been obtained by all counsel listed above.

Dated: May 30, 2018

/s/ Adam E. Polk
Adam E. Polk

EXHIBIT 2



ATTORNEYS AT LAW

June 21, 2018

**VIA FEDERAL EXPRESS AND
CERTIFIED MAIL RETURN RECEIPT REQUESTED**

Pacific Fertility Center
55 Francisco Street, Suite 500
San Francisco, CA 94133

**Re: Notice of Violation of California's Consumers Legal Remedies Act and
Demand for Relief, Pursuant to Cal. Civ. Code § 1782**

To Whom It May Concern:

Girard Gibbs LLP, Lieff Cabraser Heimann & Bernstein, LLP, and Peiffer Wolf Carr & Kane, A.P.L.C. represent A.B., C.D., E.F., G.H., I.J., K.L., M.N., and O.P. ("Plaintiffs"). As reflected in further detail in the attached complaint, filed in *In re Pacific Fertility Center Litigation*, Case No. 3:18-cv-01586-JSC (N.D. Cal.), Plaintiffs allege that Pacific Fertility and Prelude engaged in deceptive acts and practices, including by failing to disclose that their storage tank, electronic monitoring, alarm, and response systems and processes were inadequate to safely store Plaintiffs' eggs and embryos. As a result, on March 4, 2018, Pacific Fertility discovered that the nitrogen levels in a storage tank known as "Tank 4" had dropped to an unsafe level for an undetermined period of time, destroying or jeopardizing the eggs and embryos stored in the tank, including those belonging to Plaintiffs.

Defendants' conduct violates California consumer protection law, including California's Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*, because Pacific Fertility and Prelude:

1. Represented that their services had characteristics, uses, and benefits that they did not have (Cal. Civ. Code § 1770(5));
2. Represented that their services were of a particular standard, quality, or grade when they were not (Cal. Civ. Code § 1770(7));
3. Advertised services with intent not to sell them as advertised (Cal. Civ. Code § 1770(9)); and
4. Represented that the subject of a transaction had been supplied in accordance with a previous representation when it had not (Cal. Civ. Code § 1770(16)).

With this letter, our firms, on behalf of Plaintiffs and a proposed class of all individuals and their reproductive partners who had eggs, embryos, or other material in Tank 4 at Pacific Fertility Center in San Francisco, California on March 4, 2018, demand that you correct your business practices and take prompt action.

To: Pacific Fertility Center
Re: Notice of Violation of CLRA and Demand for Relief
Date: June 21, 2018
Page: 2 of 3

Please direct all communications or responses regarding this notice to the following counsel:

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REQUESTED REMEDIES

Plaintiffs DEMAND THAT WITHIN THIRTY DAYS you remedy your violations by doing the following:

- I. Disseminate a notice reasonably intended to reach all proposed class members, setting forth:
 - a. The existence and description of the *Pacific Fertility Center* litigation, including a summary of the subject matter and the claims asserted;
 - b. The name, address, and telephone number of Plaintiffs' counsel, identified above; and
 - c. The right of proposed class members to obtain the remedies described below.
- II. Subject to monitoring and confirmation by Plaintiffs' counsel, compensate proposed class members for all injuries caused by Pacific Fertility and Prelude's failure to disclose that their systems and processes were inadequate to safely store human reproductive tissue, including for class members' resulting emotional distress, mitigation expenses, and the costs of Defendants' services.
- III. Immediately cease selling services while maintaining systems and processes that are inadequate to safely store human reproductive tissue, until you:
 - a. Allow Plaintiffs' counsel to inspect Pacific Fertility and Prelude's current systems and processes; and

To: Pacific Fertility Center
Re: Notice of Violation of CLRA and Demand for Relief
Date: June 21, 2018
Page: 3 of 3

b. Implement all system and process improvements demanded by Plaintiffs' counsel following inspections.

IV. Pay into a court-approved escrow account an amount of money sufficient to pay Plaintiffs' reasonable attorneys' fees and costs.

Please contact us within thirty days to discuss Pacific Fertility and Prelude's implementation of these remedies.

Very truly yours,

GIRARD GIBBS LLP



Adam E. Polk

Enclosure

cc: Joseph S. Picchi
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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE PACIFIC FERTILITY CENTER
LITIGATION

Case No. 3:18-cv-01586-JSC

**CONSOLIDATED AMENDED CLASS
ACTION COMPLAINT**

DEMAND FOR JURY TRIAL

TABLE OF CONTENTS

NATURE OF THE ACTION	1
JURISDICTION AND VENUE	2
INTRADISTRICT ASSIGNMENT.....	3
PARTIES	3
A. Plaintiffs.....	3
B. Defendants	4
1. Prelude	4
2. Pacific Fertility.....	5
3. Chart.....	6
FACTUAL ALLEGATIONS	7
I. Plaintiffs Entrusted Prelude and Pacific Fertility with Keeping their Eggs and Embryos Safe and Secure.	7
A. Defendants market their cryopreservation services as an insurance policy that unwinds the biological clock, preserving the opportunity to have children when the time is right.....	7
B. Defendants market their cryopreservation and storage services to people struggling with infertility.	9
C. Defendants promised to keep Plaintiffs’ eggs and embryos safe in a state-of-the-art facility.....	10
II. Precision and Care Are Required in the Cryopreservation and Storage of Eggs and Embryos.	13
A. The process of retrieving and storing eggs and embryos is demanding, time consuming, and expensive.	13
B. The loss of eggs and embryos results in emotional trauma.	18
C. Successful cryopreservation depends on strict adherence to protocols.	19
III. Defendants Caused Irreparable Harm to Plaintiffs by Failing to Protect Their Eggs and Embryos.	21
A. Prelude and Pacific Fertility should have had systems and processes in place to ensure that Plaintiffs’ eggs and embryos were not damaged.....	21

B.	Chart recalled cryostorage tanks for vacuum seal defects after the Tank 4 incident.....	22
C.	Multiple investigations were opened after the Tank 4 incident.....	22
D.	Defendants’ failure to keep Plaintiffs’ eggs and embryos safe and secure has caused irreparable harm.	23
E.	Pacific Fertility and Prelude’s communications regarding the incident have compounded the harm.....	26
PLAINTIFF-SPECIFIC ALLEGATIONS		29
CLASS ACTION ALLEGATIONS		34
CLAIMS FOR RELIEF		37
FIRST CAUSE OF ACTION		
	Negligence and/or Gross Negligence (Against All Defendants)	37
SECOND CAUSE OF ACTION		
	Breach of Contract (Against Pacific Fertility and Prelude)	40
THIRD CAUSE OF ACTION		
	Bailment (Against Pacific Fertility and Prelude).....	40
FOURTH CAUSE OF ACTION		
	Premises Liability (Against Pacific Fertility and Prelude)	41
FIFTH CAUSE OF ACTION		
	Breach of Fiduciary Duty – Failure to Use Reasonable Care (Against Pacific Fertility and Prelude)	42
SIXTH CAUSE OF ACTION		
	Violations of the Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 <i>et seq.</i> (Against All Defendants)	43
SEVENTH CAUSE OF ACTION		
	Violations of the Consumers Legal Remedies Act, Cal. Civ. Code § 1750 <i>et seq.</i> (Against Pacific Fertility and Prelude)	45
EIGHTH CAUSE OF ACTION		
	Deceit and Fraudulent Concealment (Against Pacific Fertility and Prelude).....	47
NINTH CAUSE OF ACTION		
	Strict Products Liability – Failure to Warn (Against Chart).....	49
TENTH CAUSE OF ACTION		
	Strict Products Liability – Manufacturing Defect (Against Chart).....	50

1	ELEVENTH CAUSE OF ACTION	
2	Strict Products Liability — Design Defect — Consumer Expectations Test (Against Chart) ...	50
3	TWELFTH CAUSE OF ACTION	
4	Strict Products Liability – Design Defect – Risk-Utility Test (Against Chart)	51
5	THIRTEENTH CAUSE OF ACTION	
6	Negligent Failure to Recall (Against Chart)	51
7	PRAYER FOR RELIEF	52
8	DEMAND FOR JURY TRIAL	53

Plaintiffs A.B., C.D., E.F., G.H., I.J., K.L., M.N., and O.P. (“Plaintiffs”), individually and on behalf of all others similarly situated, file this Consolidated Class Action Complaint against Defendants Pacific Fertility Center (“Pacific Fertility” or “PFC”), Prelude Fertility, Inc. (“Prelude”), and Chart Industries (“Chart”) (collectively, “Defendants”) and allege as follows:

NATURE OF THE ACTION

1. Prelude and Pacific Fertility market and sell egg and embryo cryopreservation services. They liken these services to an insurance policy for women and families, claiming the services provide peace of mind to those who wish to defer having children and relief to those seeking to overcome a diagnosis of infertility. Cryopreservation involves preservation of tissue—here, human eggs and embryos—using cooling techniques. In the 1980s, facilities began using a cryopreservation technique known as “slow freezing” to preserve human reproductive tissue. Cryopreservation became more prevalent after the advent in the early 2000s of vitrification, a process by which tissue is cooled more quickly, resulting in higher egg and embryo survival rates. Eggs or embryos frozen through cryopreservation are stored in specially designed metal tanks.

2. Recognizing that the eggs and embryos entrusted to their care are irreplaceable, Prelude and Pacific Fertility promise their clients, including Plaintiffs, that they will use state-of-the-art laboratory equipment and protocols to ensure the safekeeping of the eggs and embryos. Safe storage requires backup redundancies to guard against a catastrophic failure, daily inspections of the tanks, and alarm systems to immediately notify staff of a potential failure.

3. On March 4, 2018, Pacific Fertility discovered that the liquid nitrogen levels in a tank known as “Tank 4” had dropped to an unsafe level for an undetermined period of time, destroying or jeopardizing the eggs and embryos stored in the tank, including those belonging to Plaintiffs. Chart manufactured Tank 4.

4. Pacific Fertility’s first notification of the failure of Tank 4 was via an email sent at four in the morning Pacific time on Sunday, March 11, 2018. Pacific Fertility described the failure as “a very unfortunate incident” in which the storage tank containing Plaintiffs’ cryopreserved eggs and embryos “lost liquid nitrogen for a brief period of time,” and stated that a “preliminary analysis” suggested some of the eggs and embryos in the tank may have been destroyed.

5. Over a month later, on April 19, 2018, Pacific Fertility again wrote to Plaintiffs, notifying them that an investigation had shown the incident resulted from “a failure of the tank’s vacuum seal.” Four days later, Chart recalled several of its cryopreservation tanks, citing “reports of a vacuum leak or failure that could compromise the product.”

6. Pacific Fertility and Prelude were responsible for monitoring Tank 4’s performance for fluctuations in temperature or liquid nitrogen levels, which could endanger the enclosed eggs and embryos, and to maintain safety systems to mitigate a tank failure. Pacific Fertility and Prelude failed in that responsibility, committed gross negligence, and breached their agreement by failing to safely preserve the eggs and embryos under their care.

7. To Plaintiffs’ shock and dismay, Pacific Fertility and Prelude did not separate their eggs or embryos into different tanks to ensure that at least some tissue would be safe if one tank failed.

8. As a result of Defendants’ failures, Plaintiffs and the proposed class have suffered harm. Learning that their reproductive tissue was compromised has caused them devastation, panic, and distress. For many, the tissue in Tank 4 represented their last and only chance for a biological child. Pacific Fertility and Prelude have informed Plaintiffs that it is not possible to know whether their eggs or embryos are viable until they are warmed, and even then, the full extent of the damage cannot be known without attempting a pregnancy. These messages have cast a cloud of uncertainty over women and families, causing anguish and despair.

9. Plaintiffs, individually and on behalf of the class, seek appropriate relief through this action.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this action under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), because (a) Plaintiffs are citizens of states different from Prelude and Chart, (b) the amount in controversy exceeds \$5,000,000, excluding interest and costs, (c) the proposed class consists of more than 100 individuals, and (d) none of the exceptions under the subsection applies to this action.

11. This Court has personal jurisdiction over Defendants. They conduct substantial business in California and intentionally availed themselves of the laws and markets of this state. A significant

portion of the acts and omissions at issue occurred in California, and Plaintiffs and many class members suffered harm in California. Plaintiffs' claims against Defendants are meaningfully connected to California in that: (1) each Plaintiff had eggs and embryos stored at Pacific Fertility, which is located in California and within the Prelude network; and (2) each Plaintiff had eggs and embryos stored in Chart's tank, which was physically located at Pacific Fertility's San Francisco facility, and which failed, resulting in damage to Plaintiffs.

12. Venue is proper in this District under 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District.

INTRADISTRICT ASSIGNMENT

13. Assignment to the San Francisco Division is proper under Local Rules 3-2(c) and (d) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in San Francisco.

PARTIES

A. Plaintiffs

14. Plaintiff A.B. is a citizen and resident of Sacramento County, California.

15. Plaintiff C.D. is a citizen and resident of Sacramento County, California.

16. Plaintiff E.F. is a citizen and resident of San Francisco County, California.

17. Plaintiff G.H. is a citizen and resident of San Francisco County, California.

18. Plaintiff I.J. is a citizen and resident of San Francisco County, California.

19. Plaintiff K.L. is a citizen and resident of San Francisco County, California.

20. Plaintiff M.N. is a citizen and resident of San Francisco County, California.

21. Plaintiff O.P. is a citizen and resident of San Mateo County, California.

22. Given the sensitive nature of their claims and the services they purchased from Pacific Fertility and Prelude, Plaintiffs are using initials in this litigation to protect their privacy. If required by the Court, Plaintiffs will seek permission to proceed under these pseudonyms.

1 **B. Defendants**

2 **1. Prelude**

3 23. At all relevant times, Defendant Prelude Fertility, Inc. was a Delaware corporation
4 headquartered in Florida. Prelude owns and runs a network of fertility clinics and egg and embryo
5 storage facilities—including Pacific Fertility Center—across the country.

6 24. Prelude was founded in 2016 by startup entrepreneur Martin Varsavsky with a \$200
7 million investment by New York-based Lee Equity Partners. Prelude’s stated business plan is to create
8 a national network of fertility clinics, as well as egg and embryo cryopreservation and storage centers
9 “all delivered with the highest level of personalized care by the nation’s leading reproductive
10 endocrinologists and practitioners.”¹ According to Varsavsky, “What Prelude does is bridge the gap, it
11 makes people’s biology meet their psychology” through “The Prelude Method”: “You freeze your
12 gametes when fertile, thaw them and create embryos when ready, genetically sequence the embryos,
13 and then transfer one embryo at a time. And you continue to do this until you achieve your desired
14 number of children.”²

15 25. Included within the Prelude network is MyEggBank, which Prelude claims has the
16 largest and most diverse selection of egg donors in the country. Prelude also claims that its embryo
17 survival rates are greater than 90% and that women who use eggs from MyEggBank have a 90%
18 pregnancy success rate within three cycles.³

19 26. Prelude acquired Pacific Fertility in September 2017 as part of Prelude’s business plan
20 to build its national network. Prelude directs potential clients to Pacific Fertility via its website and its
21 network of fertility clinics. Prelude also provides financing plans for services at Pacific Fertility.

22
23
24
25 ¹ *A Modern Approach to Family*, Prelude Fertility, <https://www.preludefertility.com/about> (last visited May 18, 2018).

26 ² Martin Varsavsky, *Why I founded Prelude Fertility: Background on vision and bringing on the team to make it*
27 *thrive* (Mar. 7, 2017), <http://vator.tv/news/2017-03-07-why-i-founded-prelude-fertility> (last visited May 30, 2018).

28 ³ *Have Questions?*, Prelude Fertility, <https://preludefertility.com/faq> (last visited May 18, 2018).

27. Prelude represents that Pacific Fertility is one of “Our Clinics.”⁴ It represents that Pacific Fertility’s clients are “Our” clients.⁵

28. In its press release announcing the addition of Pacific Fertility to its network of fertility clinics, Prelude described “egg freezing, in vitro fertilization (IVF), genetic screening of embryos, and donor egg matching” as part of “Prelude’s comprehensive services.”⁶

29. Prelude owns the laboratory, storage facility, and tanks at Pacific Fertility. It owned Tank 4 at the time of the March 4, 2018, incident.

30. The employees responsible for performing daily monitoring and maintenance of the tanks, including Tank 4, are employees of Prelude.

2. Pacific Fertility

31. Defendant Pacific Fertility Center is a private unincorporated entity located at 55 Francisco Street, Suite 500, San Francisco, California 94133.

32. Pacific Fertility was founded in 1999 and provides a full range of fertility services, including egg cryopreservation, IVF, genetic testing, “cutting-edge laboratory techniques and technology such as . . . vitrification,” and storage of cryopreserved eggs and embryos.⁷

33. At all relevant times, Pacific Fertility’s on-site San Francisco laboratory has cryopreserved and stored eggs and embryos, including those belonging to Plaintiffs.⁸

34. At the time of the March 4, 2018, incident, Tank 4 was located at Pacific Fertility Center’s laboratory in San Francisco.

⁴ *Options Preserved, Our Clinics*, Prelude Fertility, <https://www.preludefertility.com/freeze-eggs> (last visited May 18, 2018).

⁵ *Pacific Fertility Center: San Francisco*, Prelude Fertility, <https://www.preludefertility.com/clinic/pacific-fertility-center> (last visited May 18, 2018).

⁶ *Prelude Fertility Expands Network with Pacific Fertility Center in San Francisco*, Prelude Fertility, <https://www.prnewswire.com/news-releases/prelude-fertility-expands-network-with-pacific-fertility-center-in-san-francisco-300524534.html> (last visited May 18, 2018).

⁷ *Prelude Fertility Expands Network with Pacific Fertility Center in San Francisco*, Prelude Fertility, <https://www.preludefertility.com/press-release/prelude-fertility-expands-network-pacific-fertility-center-san-francisco> (last visited May 20, 2018).

⁸ *Sperm and Embryo Freezing*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/sperm-and-embryo-freezing> (last visited May 18, 2018).

3. Chart

35. Defendant Chart Industries, Inc. is a Delaware corporation headquartered in Georgia.⁹

36. Founded in 1992, Chart is a publicly traded global manufacturer of equipment used in the production, storage, and application of industrial gases. Chart produces a variety of cryogenic equipment. On its website, Chart states that its “focus is cryogenics.”¹⁰ Chart claims that its products “utilize our proprietary vacuum and insulation technologies, including storage equipment,” and that “[o]ur industry-proven core-competency provides the highest insulation thermal performance in cryogenics[.]”¹¹ Chart touts itself as “a recognized global brand for the design and manufacture of highly engineered cryogenic equipment” and a “leading global manufacturer of vacuum insulated products and cryogenic systems.”¹²

37. In its annual report for 2017, Chart described itself as a “leading diversified global manufacturer of highly engineered equipment, packaged solutions, and value-add services used throughout the gas to liquid cycle in all industries that require gases as cryogenic liquids or alternative equipment for gas generation, generally for the industrial gas, energy, and biomedical industries.”¹³

38. Through its MVE brand, Chart sells a line of cryogenic equipment that includes freezers and metal storage tanks. Chart claims that its cryogenic products “are engineered for reliability and durability”¹⁴ and that its MVE brand “is the benchmark for biological storage systems, used for the cryogenic preservation of human . . . tissues.”¹⁵

⁹ Plaintiffs only recently discovered the identity of the manufacturer—Defendant Chart—of the cryostorage tank in which Plaintiffs’ and class members’ eggs and embryos were stored at Pacific Fertility. Chart is being served concurrently with the filing of this Consolidated Amended Complaint.

¹⁰ *About Chart*, Chart Industries, <http://www.chartindustries.com/About-Chart> (last visited May 20, 2018).

¹¹ *Cryogenics*, Chart Industries, <http://www.chartindustries.com/Industry/Markets-Served/Cryogenics> (last visited May 20, 2018).

¹² *MVE Cryopreservation for Life Science*, Chart Industries, <http://files.chartindustries.com/Cryopres%20Catalog%20ML-CRYO0009%20K%203b.pdf> (last visited May 20, 2018).

¹³ *SEC Form 10-K*, Chart Industries, <http://ir.chartindustries.com/Cache/392303934.pdf> (last visited May 20, 2018).

¹⁴ *Life Sciences*, Chart Industries, <http://www.chartindustries.com/Life-Sciences> (last visited May 20, 2018).

¹⁵ *About Chart*, Chart Industries, <http://www.chartindustries.com/About-Chart> (last visited May 20, 2018).

39. Chart's BioMedical segment accounted for around 20% of its total sales. Its "cryobiological storage products include vacuum insulated containment vessels for the storage of biological materials."¹⁶ Chart describes the competition for cryobiological storage products as "significant" and notes that "competition in this field is focused on design, reliability, and price."¹⁷

40. Chart designed and manufactured the storage tank in which Plaintiffs' eggs and embryos were stored on the date of the subject incident.

FACTUAL ALLEGATIONS

I. Plaintiffs Entrusted Prelude and Pacific Fertility with Keeping their Eggs and Embryos Safe and Secure.

41. Defendants Prelude and Pacific Fertility have partnered to offer cryopreservation and storage of eggs and embryos, among other fertility services.

42. Prelude claims that it is "on a mission" to provide "the best options, science, and care so everyone can have the opportunity to be a mom or dad when they are ready."¹⁸

43. Pacific Fertility states that it has one goal: to help clients build a healthy family.¹⁹

A. Defendants market their cryopreservation services as an insurance policy that unwinds the biological clock, preserving the opportunity to have children when the time is right.

44. Human eggs, also known as oocytes, are a limited resource. According to Pacific Fertility, a woman has about 600,000 eggs at birth, and this supply diminishes at the rate of about 1,000 per month, beginning at her birth.²⁰ This decline is part of the natural aging process and is commonly referred to as a woman's biological clock. The loss of oocytes from the ovaries is relentless and

¹⁶ SEC Form 10-K, Chart Industries, <http://ir.chartindustries.com/Cache/392303934.pdf> (last visited May 20, 2018).

¹⁷ *Id.*

¹⁸ *A Modern Approach to Family*, Prelude Fertility, <https://www.preludefertility.com/about> (last visited May 18, 2018).

¹⁹ *Pacific Fertility Center*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/the-center/infertility-center> (last visited May 28, 2018).

²⁰ *Egg Freezing in Northern California*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/fertility-preservation-egg-freezing> (last visited May 27, 2018).

continues even in the absence of menstrual cycles, and even when women are pregnant, nursing, or taking oral contraceptives. In addition, as Pacific Fertility acknowledges, egg quality diminishes with time, with miscarriages and chromosomal abnormalities occurring more frequently the older a woman is at the time of pregnancy. By their early-to-mid 40s, women typically can no longer conceive a child naturally.²¹

45. The purpose of egg cryopreservation is to allow women and their reproductive partners to preserve eggs so that they may be fertilized and implanted at a later time. Both Pacific Fertility Center and Prelude emphasize that their cryopreservation and storage services allow for flexibility in their clients' family planning, freeing women, for example, to wait for the right person and to focus on their careers during their most fertile years.

46. Prelude advertises its cryopreservation and storage services as providing women with "peace of mind" and more control over their childbearing choices.²² In marketing its cryopreservation and storage services, Prelude specifically appeals to women's declining fertility and limited eggs: "Age Matters . . . We're born with all the eggs we'll ever have—and their quantity and quality decrease as we age. If you think you might want a baby someday, but aren't ready right now, freezing your eggs keeps your options open."²³ Prelude likewise states that young women cryopreserve eggs "to have the option—an insurance policy that unwinds the biological clock and lets women pursue career advancement as freely as men without having to compromise in their choice of partner."²⁴

47. In large type, Prelude states on its website, "Options Preserved," and proceeds to advertise multiple benefits from cryopreservation and storage:

²¹ *Id.*

²² *Meet Prelude Fertility, The \$200 Million Startup That Wants To Stop The Biological Clock*, Forbes (Oct. 17, 2016), <https://www.forbes.com/sites/miguelhelft/2016/10/17/prelude-fertility-200-million-startup-stop-biological-clock/#d05688c7260f>.

²³ *Options Preserved*, Prelude Fertility, <https://www.preludefertility.com/freeze-eggs> (last visited May 18, 2018).

²⁴ *Meet Prelude Fertility, The \$200 Million Startup That Wants To Stop The Biological Clock*, Forbes (Oct. 17, 2016), <https://www.forbes.com/sites/miguelhelft/2016/10/17/prelude-fertility-200-million-startup-stop-biological-clock/#d05688c7260f>.

Find that right person. Focus on your career. Finish your education. The age of your eggs (not you) is the number one cause of infertility. Freeze your eggs to preserve your option to build a family when you're ready.²⁵

Prelude goes on to describe the storage process as hassle free: "Set it and forget it until you're ready."²⁶

48. Pacific Fertility offers egg cryopreservation services as a means of preserving "a precious resource, limited to just a few years of your life[.]" and states that cryopreserving eggs and embryos "can increase your chances of conception by 5 to 10 times."²⁷

49. Pacific Fertility touts similar benefits from its fertility preservation services:

6 Reasons to Preserve Your Fertility Today! (1) For a future family . . . (2) To allow for educational pursuits . . . (3) To have time to develop a business or career . . . (4) To give your relationship time to mature . . . (5) To reduce the risk of medical treatments that might impact fertility . . . (6) To achieve control over your future.²⁸

B. Defendants market their cryopreservation and storage services to people struggling with infertility.

50. Defendants also promote their egg and embryo cryopreservation and storage services to people diagnosed with infertility.

51. Infertility is defined as the inability to conceive after one year of unprotected intercourse if a woman is under the age of 35, or after six months if a woman is 35 or older.

52. Pacific Fertility states that it sees infertility as a "workable challenge."²⁹

53. Similarly, Prelude states: "we're here to help you become a parent. We'll use all of our training, science, technology, lab skills, and most importantly, human-kindness skills, to fully support you through every step of the process."³⁰

²⁵ *Options Preserved*, Prelude Fertility, <https://www.preludefertility.com/freeze-eggs> (last visited May 18, 2018).

²⁶ *Id.*

²⁷ *Should I freeze my eggs?*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/fertility-preservation/my-eggs> (last visited May 18, 2018).

²⁸ *6 Reasons to Preserve Your Fertility Today!*, Pacific Fertility Center (June 30, 2017), <https://www.pacificfertilitycenter.com/fertility-preservation/blog/6-reasons-to-preserve-your-fertility-today>.

²⁹ *Pacific Fertility Center*, <https://www.pacificfertilitycenter.com/the-center/infertility-center> (last visited May 20, 2018).

³⁰ *Let's Make a Baby*, Prelude Fertility, <https://www.preludefertility.com/ivf> (last visited May 27, 2018).

54. For many individuals and couples experiencing infertility, Defendants' embryo cryopreservation services represented their best and only hope of having a biological child or of having children who are biological siblings.

C. Defendants promised to keep Plaintiffs' eggs and embryos safe in a state-of-the-art facility.

55. Defendants emphasize that eggs and embryos will be safely stored, indefinitely, for future family planning.

56. Prelude's marketing messages recognize the importance of proper egg storage for those who use its services. A Prelude spokesperson, Allison Johnson, said: "If you know that your eggs are safe and sound, what decisions would you make about your life? . . . Go pursue that graduate degree. Wait for your soul mate. Go travel the world. Your eggs are waiting for you. For me that's as liberating for women as the pill was in the 60s."³¹

57. Pacific Fertility states that its clients' "[e]ggs remain frozen until you need them"³² and that "there is no limit to how long cells remain viable in the frozen state."³³

58. Regarding embryos, Pacific Fertility similarly reassures its clients that some "have come back after 10-15 years and the embryos have been thawed successfully and created healthy babies."³⁴

59. Pacific Fertility claims that its laboratory is state of the art, meeting a "gold standard,"³⁵ and that it has a large and experienced laboratory staff dedicated to the "care and well being of eggs, embryos and sperm."³⁶

³¹ *Meet Prelude Fertility, The \$200 Million Startup That Wants To Stop The Biological Clock*, Forbes (Oct. 17, 2016), <https://www.forbes.com/sites/miguelhelft/2016/10/17/prelude-fertility-200-million-startup-stop-biological-clock/#d05688c7260f>.

³² What is the process?, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/fertility-preservation/my-eggs#treatment> (last visited May 18, 2018).

³³ *Sperm and Embryo Freezing*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/sperm-and-embryo-freezing> (last visited May 18, 2018).

³⁴ *Id.*

³⁵ *Pacific Fertility Center*, <https://www.pacificfertilitycenter.com/the-center/infertility-center> (last visited May 20, 2018).

³⁶ *IVF Laboratory Team*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/fertility-specialists/ivf-laboratory-team> (last visited May 20, 2018).

60. Since the advent of cryopreservation, the main techniques to cryopreserve eggs and embryos have been slow freezing and vitrification. With slow freezing—first used in 1986—it takes about two hours for eggs to reach final storing temperature. Starting in the mid-2000s, eggs and embryos began to be preserved through a rapid cryopreservation process called vitrification.

61. Vitrification is a more advanced and reliable technology that Pacific Fertility describes as being “used in the embryo and egg freezing process so that they can be stored for later use.”³⁷ Pacific Fertility states the newer vitrification process is safer than earlier slow-freezing technologies, which could lead to crystallization threatening the viability of cryopreserved tissue. “Avoiding ice formation in this way,” Pacific Fertility represents, “successfully protects the embryos from damage and allows them to be warmed later giving survival rates consistently above 90%.”³⁸

62. Pacific Fertility further states that all eggs and embryos would be stored in vacuum-lined liquid nitrogen tanks—“like a large thermos flask”—that “are computer controlled and monitored 7 days a week with a dedicated alarm system.”³⁹

63. Pacific Fertility claims that liquid nitrogen “is very stable and easy to work with” and that each tank is equipped with numerous sensors to monitor temperature increases above -196°C or a drop in the level of liquid nitrogen.⁴⁰ Pacific Fertility also claims that the sensors “are connected to a telephone alarm system that will alert staff to an alarm condition outside of normal working hours. . . . The alarm system is tested weekly and continues to run on battery power in the event of a power failure. The alarm system can also be checked remotely.” When a tank alarm goes off, the on-call embryologist is supposed to arrive within 30 minutes regardless of time of day and must conduct a physical inspection of the tank before the alarm can be turned off.⁴¹

³⁷ *Vitrification, Oocyte and Embryo Vitrification*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/vitrification> (May 18, 2018).

³⁸ *Id.*

³⁹ *Sperm and Embryo Freezing*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/sperm-and-embryo-freezing> (last visited Mar. 23, 2018).

⁴⁰ *Id.*

⁴¹ *Id.*

64. Pacific Fertility further claims that, in addition to being constantly monitored, each tank “gets a physical inspection daily, looking for problems or signs of problems,” and that the amount of nitrogen in the tank “is assessed as a means of monitoring for a possible slow leak or an impending tank failure.”⁴²

65. Each tank is also supposed to receive a daily refill of nitrogen because the nitrogen in the tanks continuously evaporates at a slow rate.⁴³ It is standard in the egg and embryo storage industry for facilities to equip their tanks with autofilling mechanisms to refill the liquid nitrogen when the system detects that levels are low.

66. Pacific Fertility advertises the durability of its tanks and storage facility on its website, stating:

The storage tanks require no power and would not be impacted by a power failure or blackout. They are made of metal and would probably survive a small or moderate fire. If the tanks were not physically damaged or knocked over in a disaster, they should survive intact. Even if no one was able to physically check the tanks, or if we were unable to obtain liquid nitrogen, the tanks should still maintain their temperature for several days.⁴⁴

67. Pacific Fertility represents that its egg and embryo cryopreservation and freezing services are highly successful, with egg survival rates of 83%⁴⁵ and embryos survival rates consistently above 90%.⁴⁶

68. Prelude also touts “greater than 90%” egg and embryo survival rates.⁴⁷

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Lab FAQs*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/the-center/lab-faq> (May 20, 2018).

⁴⁵ *What are your success rates?*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/fertility-preservation/my-eggs#success> (last visited May 20, 2018).

⁴⁶ *Vitrification, Oocyte and Embryo Vitrification*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/vitrification> (May 18, 2018).

⁴⁷ *Have Questions?, What are the chances of pregnancy with frozen embryos?*, Prelude Fertility, <https://www.preludefertility.com/faq> (last visited May 27, 2018).

II. **Precision and Care Are Required in the Cryopreservation and Storage of Eggs and Embryos.**

A. **The process of retrieving and storing eggs and embryos is demanding, time consuming, and expensive.**

69. People who use Defendants' cryopreservation services typically make an enormous emotional investment. They endure painful and invasive procedures, financial stress, and the strain the process puts on their mental health and relationships with others, all in the hopes that one day they will be able to have a child.

70. Women take drug and hormone cocktails and injections over several weeks to stabilize the uterine lining, stimulate ovaries into producing follicles, and stop these ovary follicles from releasing eggs. Then, after an ovulation trigger injection, eggs are collected under sedation or a general anesthetic. A woman may be subjected to multiple painful injections each day, resulting in bruising, swelling, and overall discomfort. The drug and hormone therapy may also trigger other side effects, such as tiredness, nausea, headaches, and blood clots, as well as negative emotions. Many women also undergo acupuncture sessions, recommended by Pacific Fertility, to improve IVF outcomes. The process can limit travel and other activities, and often requires time off from work. The harvesting procedure itself can be painful and hard to endure, requiring insertion of a thick needle through the vaginal wall to drain the ovary follicles of their fluid. After the procedure, a woman often experiences residual pain for about a week and may need bed rest for several days. Some women suffer significant side effects, such as ovarian hyperstimulation syndrome, requiring hospitalization.

71. Undergoing egg retrieval is "emotionally trying" as well as physically demanding.⁴⁸ Pacific Fertility acknowledges that feelings of anxiousness, depression, isolation, and helplessness are common among clients undergoing IVF services, and that strained and stressful relations with spouses, partners, and other loved ones are also common. IVF typically causes those undergoing treatment to

⁴⁸ *Patient Support*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/patient-support> (last visited May 27, 2018).

rely heavily on friends and significant others for support, including, for example, with coping with stress and providing rides to and from appointments.⁴⁹

72. According to Pacific Fertility's website, "the time and energy that is needed, both physically and emotionally can drain even the staunchest crusader."⁵⁰

73. According to one research study, half of women seeking IVF services described infertility as the most upsetting experience of their lives.⁵¹ Other studies show that infertility causes anguish similar to that accompanying a cancer diagnosis or the loss of a loved one.⁵² Infertility is associated with anger, depression, anxiety, marital problems, and loss of self-esteem among prospective parents experiencing infertility.⁵³ Pacific Fertility warns clients that they may experience intense anger, despair, and guilt, and that it is "is very common to experience symptoms of anxiety and depression as a result of this experience."⁵⁴

74. The cryopreservation process compounds these emotions and stresses. For many, this process represents their last hope for having children. Each cycle can produce anxiety and fear that there won't be enough eggs retrieved, or that the eggs retrieved won't be of a high enough quality. Multiple cycles are often required. Many women experience and express strong feelings of anxiety, failure, hopelessness, and disappointment during this process.

75. Prelude acknowledges its clients' vulnerability during the cryopreservation process and trains its staff on how to empathize with clients:

⁴⁹ *Resources at Your Fingertips*, Pacific Fertility Center (Nov. 22, 2004), <https://www.pacificfertilitycenter.com/blog/fertility-resources-your-fingertips>.

⁵⁰ *Id.*

⁵¹ *The psychological impact of infertility and its treatment*, Harvard Medical School (May 2009), https://www.health.harvard.edu/newsletter_article/The-psychological-impact-of-infertility-and-its-treatment.

⁵² A.D. Domar et al., *The psychological impact of infertility: a comparison with patients with other medical conditions*, *Journal of Psychosomatic Obstetrics & Gynecology* (1993), <https://www.massgeneral.org/bhi/assets/pdfs/publications/Domar%201993%20J%20Psychosom%20Obstet%20Gynaecol.pdf>; C. A. Bryson, *Post IVF syndrome? Psychological implications of failed IVF*, *The Obstetrician & Gynaecologist* (2002), <https://obgyn.onlinelibrary.wiley.com/doi/pdf/10.1576/toag.2002.4.4.201>.

⁵³ P.K. Dekar et al., *Psychological aspects of infertility*, *British Journal of Medical Practitioners* (2010), <http://www.bjmp.org/content/psychological-aspects-infertility>.

⁵⁴ *Coping Strategies*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/coping-strategies> (last visited May 20, 2018).

Fertility is such an incredibly personal and vulnerable subject. The World Health Organization has designated infertility as the ‘third biggest global epidemic,’ and yet as a society, we hardly even talk about it . . . until it gets personal. As more people delay childbirth past their peak fertility years to pursue careers, advanced degrees, or the right life partner, the chances of having a baby the old fashioned way start to decline.⁵⁵

* * *

As women, mothers, sisters, and daughters we make it a priority to educate and support all of our staff on how it feels to go through these journeys and how much it means.⁵⁶

76. “The emotional part is driving what we are trying to do,” Prelude’s chief revenue officer said. She further noted that a number of Prelude’s own employees have been touched by infertility.⁵⁷

77. “Emotional health” and “well being” are central to Pacific Fertility’s stated mission:

We are dedicated to a whole patient approach. We recognize that fertility treatment may impact all corners of our patient’s lives, including work, personal relationships and financial concerns. When designing their treatment course, our physicians, nurses and counselors work with them to accommodate all of these considerations.

Our support is integrated. Emotional health and well being are central to our patient’s care. Our clinic’s services include acupuncture and an array of Mind/Body and stress reduction workshops, seminars and support groups. Our in-house family therapist is available to any patient and will also gladly provide referrals to other qualified professionals.⁵⁸

78. Pacific Fertility recognizes the need to address clients’ “emotional and even spiritual needs” during the “emotional ups and downs” of infertility:

At PFC, we know that the physical demands and emotional ups and downs of

⁵⁵ *A Modern Approach to Family*, Prelude Fertility, <https://www.preludefertility.com/about> (last visited May 20, 2018).

⁵⁶ *Id.*

⁵⁷ *Meet Prelude Fertility, The \$200 Million Startup That Wants To Stop The Biological Clock*, Forbes (Oct. 17, 2016), <https://www.forbes.com/sites/miguelhelft/2016/10/17/prelude-fertility-200-million-startup-stop-biological-clock/#d05688c7260f>.

⁵⁸ *Fertility Treatment and Care*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/fertility-treatment-and-care> (last visited May 27, 2018).

infertility experience can impact life at home, at work and with family. This is a path that one likely did not anticipate and, while there is much reason for hope, the treatment process can also be emotionally trying. The well being of our patients is a crucial aspect of fertility treatment, and we encourage our patients to take advantage of the many resources we have developed to address the emotional and even spiritual needs they may have as a part of their journey.

PFC's extensive support system includes a devoted patient care team, experienced clinical coordinators and educators and an in-house marriage and family therapist who has long specialized in fertility and third party parenting issues.⁵⁹

79. Acknowledging the stress and challenges those contending with infertility face, Pacific Fertility promises its clients that it will be "by their side every step of the way":

A diagnosis of infertility can feel overwhelming and stressful for individuals and couples who always assumed that pregnancy would come easily. At Pacific Fertility Center, we see infertility as a workable challenge. . . .

We feel strongly that the physical well being is tied to emotional well being, and we take into account all of the challenges[,] . . . [including d]iagnosis, treatment and the inevitable 'waiting game' as well as financial stress We are by their side every step of the way to help address each and all of these needs.⁶⁰

80. Pacific Fertility and Prelude's services are costly. Clients pay more than \$8,000 for a single cycle of egg cryopreservation, which includes clinical monitoring, egg retrieval, cryopreservation, and one year of egg storage. Additional cycles cost \$6,995 each. Pacific Fertility recommends storing more eggs than a woman typically produces in a single cycle.⁶¹ It is not uncommon for women to undergo three or more egg cryopreservation cycles.

⁵⁹ *Patient Support*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/patient-support> (last visited May 27, 2018).

⁶⁰ *Pacific Fertility Center*, <https://www.pacificfertilitycenter.com/the-center/infertility-center> (last visited May 20, 2018).

⁶¹ *How many eggs do I need to freeze?*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/fertility-preservation/ask-us#how-many> (last visited May 21, 2018); *How Many Eggs Should I Freeze?*, Southern California Reproductive Center, <https://blog.scrxiv.com/how-many-eggs-should-i-freeze> (last visited May 21, 2018).

81. The costs incurred to cryopreserve embryos are even higher. Pacific Fertility charges \$11,595 for basic IVF, including clinical monitoring, egg retrieval, lab processing, and embryo transfer.⁶² If a client chooses to use Comprehensive Chromosome Screening to select the healthiest embryo to transfer, Pacific Fertility's basic IVF costs rise to \$16,085.⁶³

82. The above amounts do not include the costs of in-person consultations (\$375), pre-cycle lab work, egg cryopreservation medications (\$2,000–6,000), embryo transferring (\$2,845–4,460), embryo transfer medications (\$300–600), and continuing charges for egg and embryo storage (\$600 per year).⁶⁴ Clients typically also pay thousands of dollars for fertility drugs leading up to egg retrieval, and often spend hundreds of dollars on acupuncture and other recommended services to improve outcomes. The entire process often costs many tens of thousands of dollars.

83. Most insurance plans do not cover egg cryopreservation and other fertility services.⁶⁵ A 2017 study by Mercer found that only 26% of companies with over 500 employees cover IVF.⁶⁶ As a result, people seeking fertility services have taken out home equity loans, borrowed from their 401(k) accounts, tapped their lines of credit, and moved in with their parents.⁶⁷

84. In part because of these challenging processes, costs, and experiences, many clients form strong emotional attachments to their eggs and embryos. It is not unusual for women and their reproductive partners to think about their eggs or embryos every day.

⁶² *In-Vitro Fertilization (IVF) Costs*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/financing-fees/vitro-fertilization-ivf-costs> (last visited May 21, 2018).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Fertility treatments are becoming a financial and physical risk for many Americans*, CNBC (Nov. 20, 2017), <https://www.cnbc.com/2017/11/17/most-patients-getting-ivf-arent-covered-by-insurance.html>; M. Inhorn et al., *Medical egg freezing: How cost and lack of insurance cover impact women and their families*, Reproductive Biomedicine & Society Online (Jan. 21, 2018), <https://www.sciencedirect.com/science/article/pii/S2405661818300017>.

⁶⁶ *Fertility treatments are becoming a financial and physical risk for many Americans*, CNBC (Nov. 20, 2017), <https://www.cnbc.com/2017/11/17/most-patients-getting-ivf-arent-covered-by-insurance.html>.

⁶⁷ *Id.*; *Infertility Treatment Grants and Scholarships*, RESOLVE, <https://resolve.org/what-are-my-options/making-infertility-affordable/infertility-treatment-grants-scholarships/> (last visited May 21, 2018).

B. The loss of eggs and embryos results in emotional trauma.

85. Prelude and Pacific Fertility are well aware of the lengths to which people go to obtain eggs and embryos, how much these eggs and embryos mean to their clients, the clients' emotional investment in the survival of the eggs and embryos, and the clients' expectations that great care will be taken to preserve and protect the eggs and embryos to avoid irreparable, devastating harm.

86. Eggs and embryos are precious. They offer the opportunity to fulfill one of the most fundamental human urges: to become a parent and create one's own family when the time is right. Even for those who have already met their family planning goals, their remaining eggs and embryos retain emotional value. Many opt to continue storing their eggs and embryos for years after they have successfully had children. Some hold funeral ceremonies for embryos.⁶⁸ Others who no longer plan to use their eggs and embryos hope to donate them to a family member or other couple struggling with infertility, or toward beneficial research.

87. Eggs and embryos are irreplaceable. As women age, their egg quantity and quality diminish. The most determinative factor in IVF success is the woman's age at the time her eggs were extracted. At some point, usually around her mid-40s, a woman can no longer produce viable eggs. Even if additional eggs can be retrieved, one cannot replace 35-year-old eggs with 42-year-old eggs and expect the same result. When eggs and embryos are damaged or compromised, it may be impossible for clients to have their own biological children. There is no possibility of creating substitute embryos for cancer survivors or those whose spouses have died. Likewise, those who used donor eggs or sperm to create embryos may find it impossible to retrieve additional material from the same donors. Thus, donor-users who already have children may be prevented from having additional children who are biologically related to their siblings.

88. At the time of their freezing, most of the eggs and embryos that Pacific Fertility stored were viable rather than being compromised or incapable of successful fertilization or implantation.

⁶⁸ J. Fraga, *After IVF, Some Struggle With What To Do With Leftover Embryos*, NPR (Aug. 20, 2016), <https://www.npr.org/sections/health-shots/2016/08/20/489232868/after-ivf-some-struggle-with-what-to-do-with-leftover-embryos>.

Most of the embryos that Pacific Fertility stored had been tested and found free of chromosomal abnormalities.

89. The success or failure of egg and embryo cryopreservation and storage services has emotional and psychological ramifications for those seeking to become parents. Losing an egg or embryo provokes the fear that having a child is no longer possible, causing feelings of devastation and despair. Many experience grief and anguish when fertility treatment does not result in pregnancy or when they lose fertility choices.⁶⁹ Pacific Fertility's website itself provides coping strategies and techniques for reducing stress.⁷⁰

C. Successful cryopreservation depends on strict adherence to protocols.

90. Eggs and embryos are fragile. It is critical that they be handled and stored carefully. Cooling, warming, and the removal of cryoprotectants must follow precise, controlled protocols. Failure to adhere to these protocols can kill the egg or embryo, impair implantation and viability, and introduce chromosomal abnormalities.

91. Egg and embryo cryopreservation entails preserving the reproductive material at subzero temperatures. A key goal of cryopreservation is to reduce cell damage caused by the formation of ice crystals and the expansion of water as cryopreserved material cools to subzero temperatures. According to Pacific Fertility, "[t]he key to successful egg freezing is determining a technique that will not damage the fragile chromosomes of the egg"; this is because "the chromosomes of the egg are vulnerable to damage, including damage from the exertion of the freezing and thawing process."⁷¹

92. As noted above, two primary cryopreservation technologies have emerged. Both rely upon cryoprotectants, which are solutions added to the cells that reduce cell damage by displacing water in a manner similar to antifreeze. The first technology, slow freezing (also known as slow programmable freezing), utilizes specialized laboratory equipment that lowers the temperature of

⁶⁹ C. A. Bryson, *Post IVF syndrome? Psychological implications of failed IVF*, The Obstetrician & Gynaecologist (2002), <https://obgyn.onlinelibrary.wiley.com/doi/pdf/10.1576/toag.2002.4.4.201>.

⁷⁰ *When to See a Therapist*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/when-to-see-a-therapist> (last viewed May 20, 2018).

⁷¹ *New Clinical Study: New Technique for Egg Freezing*, Pacific Fertility Center (Feb. 25, 2006), <https://www.pacificfertilitycenter.com/blog/new-clinical-study-new-technique-egg-freezing>.

embryos conditioned with cryoprotectants in a slow, controlled manner to -190°C . The second and newer technology, vitrification, refers to any process resulting in “glass formation”—that is, the transformation from a liquid to a hardened liquid with minimal crystallization (ice crystals). According to Pacific Fertility, vitrification “cools the cells in the embryo at rates close to 5,000 degrees per minute[,]” and “embryos that are vitrified are exposed to 5-10 times more cryoprotectant than slow frozen embryos.”⁷² The ultra-rapid nature of this process minimizes (1) the formation of ice crystals and (2) toxicity damage to the cells that cryoprotectants can cause during longer exposure to warmer temperatures.

93. The process of warming eggs and embryos that have been preserved through cryopreservation is also precise and dependent on specialized techniques and chemical solutions. Pacific Fertility states that “embryos coming out of the freezer (at -196°C) are warmed to room temperature in a maximum of three seconds. This rapid warming method minimizes damage to the embryo from ice crystals that can form during warming.”⁷³ A key part of the warming procedure is the careful dilution and eventual replacement of the toxic cryoprotectant fluid with a solvent compatible with cytoplasmic fluid. Pacific Fertility states that it “incubat[es] the embryo in decreasing concentrations of the antifreeze, and increasing concentrations of water. Over a period of 15 minutes, the embryo is stepped through 3 different solutions, until finally the antifreeze is gone and all the water has been replaced.”⁷⁴

94. For slow-frozen tissue, the failure to thaw slowly can result in cells over-expanding, rupturing, and dying. For vitrification, it is important to warm quickly to avoid ice formation. Thus, it is critical that tissue cryopreserved through slow freezing be thawed slowly, and that tissue cryopreserved through vitrification be warmed quickly.⁷⁵ An uncontrolled rise in temperature, like the one at issue here, can have catastrophic consequences for eggs and embryos.

⁷² *Vitrification, Oocyte and Embryo Vitrification*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/vitrification> (May 18, 2018).

⁷³ *Lab FAQs*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/the-center/lab-faq> (May 20, 2018).

⁷⁴ *Id.*

⁷⁵ *Vitrification, Oocyte and Embryo Vitrification*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/vitrification> (May 18, 2018).

1 **III. Defendants Caused Irreparable Harm to Plaintiffs by Failing to Protect Their Eggs and**
 2 **Embryos.**

3 95. On March 4, 2018, Pacific Fertility discovered a loss of a substantial amount of liquid
 4 nitrogen in one of its cryogenic storage tanks, Tank 4, manufactured by Chart. This incident affected
 5 thousands of cryopreserved eggs and embryos and more than 400 individuals and families.

6 **A. Prelude and Pacific Fertility should have had systems and processes in place to**
 7 **ensure that Plaintiffs' eggs and embryos were not damaged.**

8 96. Liquid nitrogen in cryopreservation tanks evaporates at a slow rate. Absent extreme
 9 circumstances, even when a leak occurs it should take days for a tank to warm enough to cause damage
 10 to the enclosed eggs and embryos.

11 97. Egg and embryo storage facilities have developed and implemented a variety of systems
 12 and processes to protect against liquid nitrogen levels dropping to levels low enough to endanger
 13 clients' eggs and embryos. These systems and processes include daily tank inspections, multiple alarm
 14 systems that detect and send alerts regarding low liquid nitrogen levels, and autofillers that detect and
 15 automatically replenish low liquid nitrogen levels.

16 98. Pacific Fertility promised its clients that its laboratory was state of the art, including that
 17 its tanks were equipped with around-the-clock monitoring, alarm systems, and response protocols as
 18 well as daily walk-throughs. But no alarms or phone alerts notified Pacific Fertility or Prelude of the
 19 March 4 malfunction. Instead, an embryologist discovered the problem during a routine walk-through.
 20 Staff then had to manually replenish liquid nitrogen levels in the tank.

21 99. Pacific Fertility and Prelude have not explained why they did not detect the problem
 22 during prior walk-throughs or why they did not have a functional autofilling mechanism to replenish
 23 the low liquid nitrogen levels. Pacific Fertility and Prelude also lacked monitoring, alarm, and response
 24 systems and processes sufficient to detect and prevent harm from a dangerous temperature rise in Tank
 25 4. Pacific Fertility and Prelude further failed to mitigate risk by failing to implement a policy and
 26 practice of storing multiple eggs and embryos belonging to a given client in separate vials and tanks.

27 100. *Wired* interviewed one laboratory director who noted preventive measures Pacific
 28 Fertility and Prelude should have taken:

“It’s really quite sad the samples weren’t split up,” says Nahid Turan, who directs laboratory operations at the Coriell Institute for Medical Research, one of the oldest and largest biobanks in the US. “They were literally putting all the eggs in one basket.” In addition to having samples in multiple tanks at their New Jersey facility, Coriell also has back-up sites in multiple locations around the country. And its software engineers built real-time monitoring systems to flag any tanks trending in a troubling direction *before* they fail.⁷⁶

101. Cryopreserved eggs and embryos belonging to many hundreds of other people were stored in the same tank as Plaintiffs’. Tank 4 housed up to 15% of Pacific Fertility’s total cryopreserved tissue, consisting of thousands of eggs and embryos.

102. Most people with eggs and embryos stored in Tank 4 had all of their eggs and embryos stored in that single tank. Pacific Fertility has expressed regret to clients affected by the March 4 incident for not mitigating the risk by spreading their eggs and embryos across multiple tanks.

B. Chart recalled cryostorage tanks for vacuum seal defects after the Tank 4 incident.

103. On April 23, 2018, Chart, the manufacturer of Tank 4, recalled certain cryostorage tanks, stating in its recall notice: “Chart is presently investigating the possible cause of the **VACUUM LEAK AND/OR FAILURE** which may be due to inadequate adhesion of the composite neck to the aluminum unit” (emphasis in original). Chart added that the “issue appears to be an isolated occurrence involving the machine and binding agent used during the manufacturing process.”

104. Chart announced the recall four days after Pacific Fertility revealed the conclusion of “independent experts” that the March 4 incident “likely involved a failure of the tank’s vacuum seal.”

C. Multiple investigations were opened after the Tank 4 incident.

105. Various government entities and trade groups have responded to the March 4, 2018, incident. The College of American Pathologists (CAP) opened and is conducting a formal investigation into the incident, as is the State of California. The American Society for Reproductive Medicine also is studying the incident and intends to make recommendations to its members based on its findings.⁷⁷

⁷⁶ M. Molteni, *What Keeps Egg-Freezing Operations From Failing?*, Wired (Mar. 13, 2018), <https://www.wired.com/story/what-keeps-egg-freezing-operations-from-failing/>.

⁷⁷ A. E. Cha, *FAQ: Are my frozen embryos safe? Everything you need to know about the freezer malfunctions*, The Washington Post (Mar. 14, 2018), <https://www.washingtonpost.com/news/to-your->

D. Defendants' failure to keep Plaintiffs' eggs and embryos safe and secure has caused irreparable harm.

106. As a result of Defendants' conduct, Plaintiffs have suffered emotional trauma, including anxiety, hopelessness, fear, depression, devastation, and grief. Plaintiffs lost the very peace of mind they sought when availing themselves of Pacific Fertility's services, and the time, energy, and cost associated with storing their eggs and embryos have been lost as well.

107. Pacific Fertility asserts that the embryos in Tank 4 must be fully thawed to determine whether they remain viable after the incident. But, because of the risks associated with re-freezing embryos, a family must be prepared before thawing to transfer the affected embryo into a woman's uterus and attempt a pregnancy if the embryo is deemed viable. Pacific Fertility also asserts that the eggs in Tank 4 must be fully thawed and fertilized to determine whether they remain viable after the incident.

108. Pacific Fertility has agreed in some instances to thaw eggs or embryos from Tank 4, check their viability, and then refreeze the eggs or embryos. In those instances, however, Pacific Fertility has made clear that the added cycle of thawing and refreezing—resulting from its own mishandling of the eggs and embryos—creates further risks to their ultimate viability. Although this procedure would not be needed absent Defendants' failures, Pacific Fertility requires clients to sign forms purporting to waive their legal rights merely to check the viability of their tissue.

109. Some of Defendants' affected clients have decided to thaw tissue in Tank 4, and this process confirmed that their eggs or embryos are no longer viable. Many families and individuals have lost their best or only chance of having a child. They have suffered despair, depression, and heartbreak. Those who can undergo additional retrievals face a greater risk that those eggs or embryos will not lead to a successful pregnancy, as the age at which a woman's eggs are retrieved is the dominant factor for rates of success or failure.

health/wp/2018/03/14/faq-are-my-frozen-embryos-safe-everything-you-need-to-know-given-two-fertility-clinics-recent-problems/?utm_term=.86e4c34f31f3.

110. While Pacific Fertility has not shared the data it has collected regarding the number of Tank 4 eggs and embryos that have been thawed and resulting outcomes, the survival rates for these eggs and embryos is lower than it would have been had the incident not occurred.

111. Pacific Fertility has not provided a comprehensive analysis of the risks of attempting a pregnancy with any of the tissue from Tank 4, including the risks that the drop in nitrogen levels may have caused chromosomal or other defects that would not be detected from a thaw alone.

112. Nevertheless, Pacific Fertility has advised Plaintiffs A.B., C.D., and others with affected eggs and embryos to attempt pregnancies with Tank 4 tissue. Before undergoing an embryo or egg thaw, embryo transfer, or egg fertilization, Pacific Fertility requires clients to sign a consent statement acknowledging that the risks are uncertain and waiving any liability on the part of Pacific Fertility arising out of the thaw, transfer, or fertilization procedure.

113. As a result of the Tank 4 incident, Plaintiffs are being asked to make significant reproductive decisions now—depriving them of the very freedom and flexibility they sought when placing their eggs or embryos in Defendants’ care. Pacific Fertility has counseled affected clients to thaw and immediately fertilize eggs, and to transfer embryos to a woman’s uterus, to determine whether their tissue remains viable. Yet the purpose of cryopreservation was to allow these clients to make reproductive choices on their own timelines. Many clients do not yet have a partner with whom they wish to fertilize their eggs, or are not ready to move forward with a sperm donor, much less try to get pregnant now or arrange for a surrogate. Others were busy with their lives when the incident occurred—finishing graduate school, planning for international travel, or even preparing to welcome a new baby—making it impossible or highly inconvenient to attempt a pregnancy now, especially one fraught with more risk and potential heartache than normal.

114. People affected by the March 4 incident have described being thrust into a state of limbo, as the “insurance policy” they paid for has vanished. To restore their future fertility options, some are attempting additional retrieval cycles at an older age, with lower-quality eggs, and at considerable cost, burden, and disruption to their lives, subjecting them to substantial physical and emotional strain. These additional retrieval cycles also involve medical risks and potential complications. Many class members completed these cycles only to learn they were incapable of

producing sufficient or any viable eggs or embryos. Other class members, for whom additional retrievals are not possible or recommended, have been left to fear the worst—that they will be childless.

115. The National Infertility Association recognized the negative impact of the March 4 incident on women and families, stating that it was “shocked” to hear of this “unprecedented traged[y]” for “the entire family building community. Our hearts break for each person impacted. We know firsthand what someone goes through to have eggs or embryos to freeze, and to have this outcome is devastating for everyone.”⁷⁸

116. In response to a similar incident in Ohio, clinical psychologists advised that the loss of eggs and embryos should be acknowledged like any other death, and suggested grief counseling and organization of a memorial in response.⁷⁹

117. In sum, those with eggs and embryos in Tank 4 are devastated, and have compared the resulting feeling of powerlessness to that caused by a natural disaster. Many of those who had saved eggs and embryos report having lost their only chance to have biologically related children. In some cases, those affected have avoided telling family, knowing their loved ones would be “heartbroken” not to have siblings or grandchildren.⁸⁰ One couple, who had gone through the process after a cancer diagnosis, described their emotions:

My heart just sank and I felt physically ill. I felt just sick to my stomach. The world of infertility is a very isolating world, it’s very lonely[,] it’s a complete loss of control.

* * *

⁷⁸ *Statement on Storage Tank Malfunction Impacting Hundreds of Patients*, RESOLVE (Mar. 12, 2018), <https://resolve.org/about-us/news-and-press-releases/statement-on-storage-tank-malfunction-at-university-hospitals-fertility-center-in-cleveland-oh/>.

⁷⁹ J. Washington, *Experts recommend counseling & support for UH patients who lost eggs, embryos*, The Plain Dealer (Mar. 21, 2018), http://www.cleveland.com/healthfit/index.ssf/2018/03/uh_patient_who_lost_eggs_embryo.html.

⁸⁰ D. Kapp, *What It’s Like to Be a Victim of a ‘Fertility Disaster’*, The Cut (Mar. 15, 2018), <https://www.thecut.com/2018/03/pacific-fertility-center-clinic-disaster-cleveland-university-hospital.html>; S. Steimle, *Patients at Troubled San Francisco Fertility Clinic Mull Legal Action*, CBS SF Bay Area (Mar. 14, 2018), <http://sanfrancisco.cbslocal.com/2018/03/14/patients-san-francisco-fertility-clinic-mull-legal-action/>.

For some this is their last hope, I mean they physically, financially, mentally can't put themselves through that again. I've gone from anger, I've gone through just feeling a sense of loss, grief, I think right now I'm angry to be honest.⁸¹

118. Given the sensitive nature of the eggs and embryos entrusted to their care, as well as their familiarity with the deeply emotional aspects of their services, Pacific Fertility and Prelude were aware of the devastating consequences for their clients that would result from a failure to keep their eggs and embryos safe and secure.

E. Pacific Fertility and Prelude's communications regarding the incident have compounded the harm.

119. Pacific Fertility first attempted to notify its clients of the March 4 incident a week after it occurred.

120. At approximately 4 a.m. Pacific time on March 11, 2018, Pacific Fertility sent its clients an email stating:

Earlier this week, a single piece of equipment lost liquid nitrogen for a brief period of time. The remainder of the equipment and cryo-storage facility was not affected. As soon as the issue was discovered, our most senior embryologists took immediate action to secure all tissue in that single cryo-storage tank. The tank was immediately retired, and the facility is operating securely.

We have hired independent experts and launched an in-depth investigation of the matter. We felt it was imperative to advise you that your tissue was stored in the affected tank and *may* have been impacted. Based on our preliminary analysis, the good news is that we do expect that some of the tissue from that tank remains viable. We are continuing to gather information but wanted to share these developments with you directly.

121. The email further stated, "[w]e are incredibly sorry that this happened and for the anxiety that this will surely cause. We are heartbroken by this situation and our thoughts are with each of you who may have been touched by this event."

⁸¹ Mother felt "physically ill" after hearing embryos possibly destroyed at fertility center, CBS Evening News (Mar. 9, 2018), <https://www.cbsnews.com/news/mother-felt-physically-ill-after-hearing-embryos-possibly-destroyed-at-fertility-center/>.

122. The email invited Plaintiffs and other families with eggs and embryos stored in Tank 4 to call to discuss the incident with their fertility specialists. But the call center has been overwhelmed, and the information provided over the phone and in person has been vague and often inconsistent. Different Pacific Fertility staff members have provided clients with conflicting information.

123. Pacific Fertility did not provide further written information until over a month later, on April 19, 2018, when Pacific Fertility wrote to its clients with “several updates following the tank failure that occurred in the embryology lab on March 4, 2018.”

124. Pacific Fertility stated that “independent experts have been investigating the incident” and preliminarily determined that it “likely involved a failure of the tank’s vacuum seal.”

125. Pacific Fertility also stated that it had implemented new protocols—“re-inspection of onsite storage tanks, the purchase of several emergency tanks beyond our standard back-up tanks, and an extra layer of redundancy in our warning systems”—to avoid future loss of eggs and embryos, steps it should have taken before the incident.

126. Pacific Fertility initially told some clients definitively that their tissue was destroyed in the incident. It told other clients it could not determine whether their tissue survived unless they thawed and fertilized their eggs, or thawed and transferred their embryos. Pacific Fertility also refused to tell many other people whether their tissue was even stored in Tank 4, instead stating simply that an incident had occurred at its facility that may have impacted certain clients’ tissue. In post-incident calls, Pacific Fertility stated that it assumed that many were not going to use the tissue stored in Tank 4—so clients “should just let it go.” Similarly, on March 11, 2018, a Pacific Fertility employee told ABC News that a large number of families with eggs and embryos stored at the facility were “people who won’t use them anyway.” Other clients with eggs and embryos in Tank 4 were billed for storage fees after the incident occurred and before it was disclosed to them.

127. Pacific Fertility has offered some of its clients a free additional cycle for egg retrieval. Pacific Fertility’s proposed remedy is inadequate. The mishandling of client eggs and embryos is devastating and irreparable. Many can no longer undergo additional retrievals. Older women are generally not able to produce as many eggs of as high a quality as when they were younger, and in many cases go through the entire process only to learn they were unable to produce any viable eggs.

1 Even where some eggs can be retrieved, women confront a greater risk that those eggs will not lead to a
2 successful transfer and pregnancy. Moreover, additional retrievals are time consuming, expensive, and
3 physically and emotionally exhausting and burdensome, and typically require time away from work.
4 Even two or three cycles may not fully replenish the number of viable eggs or embryos lost.

5 128. Pacific Fertility's April 19, 2018, email blaming the tank failure on Chart left clients
6 with more questions than answers. Pacific Fertility did not say why the remedial steps mentioned in the
7 email, like adding redundancies, were not in place before the incident. Clients were not told why an
8 alarm did not alert Pacific Fertility staff, why a backup system (e.g., an autofill function or additional
9 generator) did not engage, or why the problem went undiscovered until someone walked through the
10 lab during a routine check.

11 129. Pacific Fertility states that tanks can go without power or liquid nitrogen for "several
12 days" without compromising the enclosed reproductive tissue. It is unclear why Pacific Fertility failed
13 to detect the problem with Tank 4 until it was too late.

14 130. Pacific Fertility's April 19 email also raised false hopes, stating that Pacific Fertility
15 "can report several early pregnancies" from thawed and transferred embryos, and had "successfully
16 thawed a limited number of eggs[,] confirm[ing] that there is viable tissue from the tank." Pacific
17 Fertility failed to mention that there is also *unviable* tissue from the tank. Pacific Fertility
18 indiscriminately notified all people with tissue in Tank 4 that their eggs and embryos might be "viable"
19 despite knowing this was *not* true for many of these people.

20 131. Clients who were devastated upon learning, in the days and weeks after Pacific
21 Fertility's first mass email, that their tissue was not viable have been doubly devastated by the
22 insensitivity of Pacific Fertility's second mass email.

23 132. Pacific Fertility executives and employees were well aware that the March 4 incident
24 would cause significant distress. Nevertheless, even though Pacific Fertility has a counselor on staff, it
25 offered no additional support services or counseling to those affected by the incident.

26 133. Pacific Fertility's failure to offer compassionate support services and to communicate
27 clearly and consistently with victims of the incident has caused them further confusion, pain, and
28 distrust.

PLAINTIFF-SPECIFIC ALLEGATIONS

Plaintiffs A.B. and C.D.

134. Plaintiffs A.B. and C.D. first contacted Pacific Fertility in or around January 2015 about the possibility of creating embryos and having their embryos frozen.

135. In January 2015, Plaintiffs A.B. and C.D. contracted with Pacific Fertility to create and have their embryos preserved for future use.

136. Plaintiffs A.B. and C.D. conducted extensive research concerning IVF and fertility centers and chose Pacific Fertility based on the belief that it provided high-quality services that were state of the art. Before having their embryos cryopreserved with Pacific Fertility, Plaintiffs A.B. and C.D. saw representations about Pacific Fertility's services on Pacific Fertility's website, including Pacific Fertility's claims that it provided high-quality services. Plaintiffs A.B. and C.D. also had a consultation session with Dr. Carl M. Herbert, who told them about Pacific Fertility's care, professionalism, and state-of-the-art facilities.

137. In early 2015, Plaintiffs A.B. and C.D. underwent procedures to prepare for embryo creation and cryopreservation. Before the egg retrieval procedure in March 2015, Plaintiff A.B. underwent a month of treatment and injections. Pacific Fertility ultimately retrieved approximately 21 of her eggs, which were then fertilized with Plaintiff C.D.'s sperm. After the fertility treatment ended, the embryos Pacific Fertility created were cryopreserved for storage. At the time of the March 4, 2018, incident, Plaintiffs A.B. and C.D. had eight viable cryopreserved embryos.

138. At all relevant times, Plaintiffs A.B. and C.D.'s embryos were under Pacific Fertility's protection, custody, and control.

139. Defendants kept Plaintiffs A.B. and C.D.'s embryos within a metal storage tank—Tank 4—at their San Francisco laboratory facility on Francisco Street. Rather than mitigating the risk of tank failure by spreading Plaintiffs A.B. and C.D.'s embryos among several tanks, Defendants stored all of Plaintiffs A.B. and C.D.'s embryos in the same tank.

140. Plaintiffs A.B. and C.D. have paid approximately \$21,105.78 for the creation and storage of their embryos. They experienced severe emotional distress when they learned of the March 4, 2018, incident and in the weeks that followed.

Plaintiff E.F.

141. Plaintiff E.F. first contacted Pacific Fertility in or around May 2016 about the possibility of having her eggs frozen.

142. In or around June 2016, Plaintiff E.F. contracted with Pacific Fertility to have her eggs retrieved and preserved for potential future use.

143. Before having her eggs cryopreserved with Pacific Fertility, Plaintiff E.F. saw representations about Pacific Fertility's services on Pacific Fertility's website, including claims regarding the qualifications of Pacific Fertility's staff and the science behind the clinic's procedures. Plaintiff E.F. also met with Dr. Carolyn Givens, who told her about Pacific Fertility's use of cutting-edge technology and assured her that her eggs would be there for as long as she needed them.

144. In the summer of 2016, Plaintiff E.F. underwent procedures to prepare for egg cryopreservation. Before the retrieval procedure, she underwent two months of treatment and injections. Pacific Fertility ultimately retrieved and cryopreserved approximately nine of her eggs.

145. At all relevant times thereafter, Plaintiff E.F.'s eggs were under Pacific Fertility's protection, custody, and control.

146. Defendants kept Plaintiff E.F.'s eggs within a metal storage tank—Tank 4—at their San Francisco laboratory facility on Francisco Street. Rather than mitigating the risk of tank failure by spreading Plaintiff E.F.'s eggs among several tanks, Defendants stored all of her eggs in the same tank.

147. Plaintiff E.F. has paid approximately \$11,000 for the retrieval and storage of her eggs. She experienced severe emotional distress when she learned of the March 4, 2018, incident and in the weeks that followed.

Plaintiff G.H.

148. Plaintiff G.H. first contacted Pacific Fertility in or around February 2016 about the possibility of having her eggs frozen.

149. In or around April 2016, Plaintiff G.H. contracted with Pacific Fertility to have her eggs retrieved and preserved for potential future use.

150. Before having her eggs cryopreserved with Pacific Fertility, Plaintiff G.H. saw representations about Pacific Fertility's services on Pacific Fertility's website, including claims about

the reputable quality of their services. Plaintiff G.H. also met with Dr. Carolyn Givens, who provided information regarding Pacific Fertility's services.

151. In the spring of 2016, Plaintiff G.H. underwent procedures to prepare for egg cryopreservation. Before the retrieval procedure, she underwent two months of treatment and injections. Pacific Fertility ultimately retrieved and cryopreserved approximately two of her eggs.

152. At all relevant times thereafter, Plaintiff G.H.'s eggs were under Pacific Fertility's protection, custody, and control.

153. Defendants kept Plaintiff G.H.'s eggs within a metal storage tank—Tank 4—at their San Francisco laboratory facility on Francisco Street. Rather than mitigating the risk of tank failure by spreading Plaintiff G.H.'s eggs among several tanks, Defendants stored all of her eggs in the same tank.

154. Plaintiff G.H. has paid approximately \$14,500 for the retrieval and storage of her eggs. She experienced severe emotional distress when she learned of the March 4, 2018, incident and in the weeks that followed.

Plaintiff I.J.

155. Plaintiff I.J. first contacted Pacific Fertility in or around November 2012 about the possibility of having her eggs frozen.

156. In or around December 2012, Plaintiff I.J. contracted with Pacific Fertility to have her eggs preserved for potential future use.

157. Before having her eggs cryopreserved with Pacific Fertility, Plaintiff I.J. saw representations about Pacific Fertility's services in Pacific Fertility's brochure, including claims that Pacific Fertility "had a very strong embryo freezing program" and that its clients "can avoid high order multiple pregnancies by transferring fewer fresh embryos and successfully freezing the remaining embryos." Plaintiff I.J. also saw representations that Pacific Fertility "devoted considerable time and effort into assembling one of the most highly trained teams in the country." Plaintiff I.J. met with staff at Pacific Fertility who assured that her eggs would be there for as long as she needed them.

158. In February 2013, Plaintiff I.J. underwent procedures to prepare for egg cryopreservation. Before the retrieval procedure, she underwent two months of treatment and injections. Pacific Fertility ultimately retrieved and cryopreserved approximately 17 of her eggs.

159. At all relevant times thereafter, Plaintiff I.J.'s eggs were under Pacific Fertility's protection, custody, and control.

160. Defendants kept Plaintiff I.J.'s eggs within a metal storage tank—Tank 4—at their San Francisco laboratory facility on Francisco Street. Rather than mitigating the risk of tank failure by spreading Plaintiff I.J.'s eggs among several tanks, Defendants stored all of her eggs in the same tank.

161. Plaintiff I.J. has paid approximately \$17,000 to Defendants for procedures, medications, and storage of her eggs. She experienced severe emotional distress when she learned of the March 4, 2018, incident and in the weeks that followed.

Plaintiff K.L.

162. Plaintiff K.L. first contacted Pacific Fertility on or around June 3, 2010, about the possibility of having her eggs cryopreserved.

163. In or around December 2015, Plaintiff K.L. contracted with Pacific Fertility to have her eggs preserved for potential future use.

164. Before having her eggs frozen with Pacific Fertility, Plaintiff K.L. saw representations about Pacific Fertility's services on Pacific Fertility's website, including Pacific Fertility's claims that the clinic and its services were safe and reliable, and that eggs could be stored until the right time for the client. Plaintiff K.L. also saw Pacific Fertility's representations that the process was quick and easy for clients and had a very high likelihood of success. In addition, Plaintiff K.L. met with Dr. Eldon Schriock, who told her that storage at Pacific Fertility was safe.

165. In February 2016, Plaintiff K.L. underwent procedures to prepare for egg freezing. Before the retrieval procedure, she underwent months of treatment and injections. She also had to take several days off from work and could not travel for work for two weeks. Pacific Fertility ultimately retrieved and froze five of her eggs.

166. At all relevant times thereafter, Plaintiff K.L.'s eggs were under Pacific Fertility's protection, custody, and control.

167. Defendants kept Plaintiff K.L.'s eggs from her first cycle within a metal storage tank—Tank 4—at their San Francisco laboratory facility on Francisco Street. Rather than mitigating the risk

1 of tank failure by spreading Plaintiff K.L.'s eggs from that cycle among several tanks, Defendants
2 stored all of her eggs in the same tank.

3 168. Plaintiff K.L. has paid approximately \$12,000 to Defendants for procedures
4 (approximately \$9,300), medications (approximately \$1,200), and storage (approximately \$600 per
5 year) of her eggs. She experienced severe emotional distress when she learned of the March 4, 2018,
6 incident and in the weeks that followed.

7 **Plaintiffs M.N. and O.P.**

8 169. Plaintiff M.N. first contacted Pacific Fertility in or around September 2011 about the
9 possibility of having her eggs frozen.

10 170. In or around late 2011, Plaintiff M.N. contracted with Pacific Fertility to have her eggs
11 preserved for potential future use.

12 171. Before having her eggs frozen with Pacific Fertility, Plaintiff M.N. saw representations
13 about Pacific Fertility's services on its website, including claims regarding its success rates and ability
14 to help couples and single people have a family and plan for the future. Plaintiff M.N. also met with
15 Dr. Eldon Schriock, who told her about Pacific Fertility's statistics and success rates.

16 172. In January 2012, Plaintiff M.N. underwent procedures to prepare for egg freezing. She
17 went through months of invasive and time-consuming treatments, including injections, blood tests, and
18 ultrasounds. She underwent approximately three retrieval cycles, resulting in approximately 37 eggs.

19 173. In 2016, Plaintiff M.N. contracted with Defendants to fertilize half of her eggs with a
20 sperm donor, resulting in three high-quality embryos. Her remaining 15 eggs were stored in Tank 4.

21 174. At all relevant times thereafter, Plaintiff M.N.'s remaining eggs were under Pacific
22 Fertility's protection, custody, and control.

23 175. Defendants kept Plaintiff M.N.'s eggs within a metal storage tank—Tank 4—at their
24 San Francisco laboratory facility on Francisco Street. Rather than mitigating the risk of tank failure by
25 spreading Plaintiff M.N.'s eggs among several tanks, Defendants stored all of her eggs in the same
26 tank.

27 176. After Plaintiff M.N. finally met the right partner, O.P., they decided to move ahead with
28 fertilizing the rest of her eggs. Plaintiffs M.N. and O.P. are in a committed relationship and plan to

raise children together. O.P. also became a client of Pacific Fertility in December 2017, when he and M.N. consulted with Pacific Fertility to begin the process of fertilizing M.N.'s remaining eggs with O.P.'s sperm. In consultation with Pacific Fertility specialists, M.N. and O.P. decided to proceed with the fertilization by mid-2018.

177. Plaintiff M.N. has paid more than \$25,000 to Defendants for procedures, medications, and storage of her eggs. The process was mentally and physically draining: Plaintiff M.N. had approximately 70 blood tests, 30 ultrasounds, and numerous injections and prescriptions. The process was also time consuming and required her to take time off from work. Plaintiffs M.N. and O.P. experienced severe emotional distress when they learned of the March 4, 2018, incident and in the weeks that followed.

* * *

178. As described above, each Plaintiff encountered specific representations by Pacific Fertility and/or Prelude regarding their egg and embryo storage services. All Plaintiffs encountered materially similar pre-treatment materials provided by Pacific Fertility.

179. At all relevant times before the incident, the oral representations and promotional and contractual materials regarding egg and embryo cryopreservation services that Plaintiffs and, inferentially, the class members received, were standardized, common, and essentially uniform.

180. Despite (1) knowledge that their electronic monitoring and alarms, and accompanying response systems and/or processes, were inadequate to protect against damage to Plaintiffs' eggs and embryos, and (2) multiple opportunities to inform Plaintiffs of the true condition of such systems and processes before Plaintiffs purchased and used their storage services, Pacific Fertility and Prelude uniformly failed to disclose to any Plaintiff that their systems were inadequate.

181. Had Defendants disclosed that their storage monitoring and alarm systems were deficient, nonfunctional, and/or incapable of protecting eggs and embryos during a tank failure, Plaintiffs would not have purchased and used Defendants' egg and embryo storage services.

CLASS ACTION ALLEGATIONS

182. Plaintiffs propose that the Court streamline the determination of common claims or issues in this case, as Defendants' misconduct leading to a single incident—the failure in Tank 4—has

affected hundreds of people at once. To facilitate such efforts through the joint trial of common questions, Plaintiffs propose certification of the following class, pursuant to Rule 23 of the Federal Rules of Civil Procedure:

All individuals, and their reproductive partners, who had eggs, embryos, or other material in Tank 4 at Pacific Fertility Center in San Francisco, California on March 4, 2018.

Excluded from this class are Defendants, their affiliates and subsidiaries, and their officers, directors, partners, employees, and agents; class counsel, employees of class counsel's firms, and class counsel's immediate family members; defense counsel, their employees, and their immediate family members; and any judicial officer who considers or renders a decision or ruling in this case, their staff, and their immediate family members.

183. Numerosity. The members of the class are so numerous that their individual joinder is impracticable. There are at least 400 class members, whose names and addresses are readily available from Defendants' records.

184. Existence and Predominance of Common Questions of Fact and Law. This action involves common questions of law and fact that predominate over any questions affecting individual class members, including, without limitation:

- a. Whether Tank 4 was defective;
- b. Whether Defendants owed a duty to Plaintiffs and class members to protect the eggs and embryos they entrusted to Defendants' care;
- c. Whether that duty was non-delegable;
- d. Whether Defendants breached their duties to protect the eggs and embryos that Plaintiffs and class members entrusted to their care;
- e. Whether the March 4, 2018, loss of liquid nitrogen in a tank at Defendants' San Francisco facility resulted from Defendants' negligence or other wrongful conduct;
- f. Whether Defendants failed to take adequate and reasonable measures to ensure that their systems were protected;

g. Whether Defendants failed to take available steps to ensure that liquid nitrogen levels in their storage tanks would remain sufficient;

h. Whether Defendants breached their contracts with Plaintiffs and class members;

i. Whether Defendants fraudulently concealed material information regarding their laboratory practices and procedures;

j. The type(s) and measure(s) of compensable and other redressable injury incurred by Plaintiffs and class members as a result of Defendants' conduct alleged herein; and

k. What measures are necessary to ensure that eggs and embryos stored at Pacific Fertility are properly safeguarded in the future.

185. Typicality. Plaintiffs' claims are typical of the other class members' claims because Plaintiffs and class members were subjected to the same wrongful conduct and damaged in the same way by having their eggs and embryos destroyed, damaged, or jeopardized.

186. Adequacy of Representation. Plaintiffs are adequate class representatives. Their interests do not conflict with the interests of the other class members they seek to represent. Plaintiffs have retained counsel competent and experienced in complex class action litigation, as well as in matters concerning egg and embryo loss, and they intend to prosecute this action vigorously. Plaintiffs and their counsel will fairly and adequately pursue and protect the interests of the class.

187. Superiority. A class action is superior to all other available means for the fair and efficient adjudication of this controversy. The highly sensitive and private nature of the facts involved here, as well as the fear that bringing an individual suit could affect future treatment at Pacific Fertility, counsels toward providing a class vehicle to adjudicate these claims. The damages or other financial detriment suffered by Plaintiffs and the other class members are relatively small compared to the burden and expense that would be required to individually litigate these claims. As a result, it would be impracticable for class members to seek redress individually. Individualized litigation would also create a potential for inconsistent or contradictory judgments and increase the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management

difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

CLAIMS FOR RELIEF

188. Plaintiffs bring each of the following claims under California law.

189. None of Plaintiffs' claims involves any allegation of medical malpractice.

FIRST CAUSE OF ACTION

Negligence and/or Gross Negligence (Against All Defendants)

190. Plaintiffs incorporate the above and below allegations by reference.

191. Defendants owed Plaintiffs a duty to exercise the highest degree of care when maintaining, inspecting, monitoring, and testing the liquid nitrogen storage tanks used for the preservation of eggs and embryos at Defendants' San Francisco laboratory.

192. Defendants owed a duty of care to Plaintiffs to act reasonably in all aspects of the storage of Plaintiffs' eggs and embryos so as to avoid destroying them, damaging them, or jeopardizing their viability given that doing so would inevitably lead to emotional distress.

193. Defendants assumed that duty of care through communications with actual and prospective clients and by reason of Defendants' special relationship with Plaintiffs arising from the sensitive services Defendants undertook to perform: human egg and embryo cryopreservation and storage.

194. Plaintiffs' harms occurred in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious harm. As Pacific Fertility states in its marketing, fertility services, including those relating to cryopreserved egg and embryo storage, can be stressful and overwhelming for those who use them.

195. It was reasonably foreseeable to Defendants that Plaintiffs would experience severe emotional distress as a result of Defendants' breach of their duty of care.

196. Defendants' carelessness and negligence directly and foreseeably damaged Plaintiffs. Plaintiffs entrusted Defendants with preserving and storing their eggs and embryos, and Defendants' mishandling of those eggs and embryos, and their subsequent mishandling of communications,

1 naturally and foreseeably caused mental anguish and emotional distress, among other injuries, to
 2 Plaintiffs.

3 197. There was a close connection between Defendants' conduct and Plaintiffs' injuries.
 4 Plaintiffs' emotional distress and other harms occurred because of Defendants' failure to act reasonably
 5 in all aspects of the storage of Plaintiffs' eggs and embryos.

6 198. Plaintiffs entrusted Defendants to use reasonable care to safeguard their eggs and
 7 embryos to preserve their reproductive options. Defendants' carelessness with this precious material,
 8 and ultimately, with the affected families' careful plans for parenthood, is reprehensible.

9 199. Imposing a duty on Defendants to avoid causing emotional distress would promote the
 10 policy of preventing future harm, insofar as they will be motivated to: (1) in the case of Prelude and
 11 Pacific Fertility, implement more effective processes and systems to ensure that eggs and embryos are
 12 safeguarded and properly stored going forward; and (2) in the case of Chart, take steps to ensure that
 13 tanks it designs to hold eggs and embryos are free from defects capable of destroying, damaging, or
 14 jeopardizing their contents. Imposing a duty on Defendants to avoid causing emotional distress also
 15 furthers the community's interest in ensuring that reliable fertility services are available to those who
 16 wish to become parents.

17 200. The burden on Defendants from a duty to avoid causing emotional distress is fair and
 18 appropriate, in light of the importance of the eggs and embryos they voluntarily agreed to protect, at
 19 considerable cost to Plaintiffs.

20 201. Defendants owed Plaintiffs a non-delegable duty of care with respect to the maintenance
 21 and protection of the eggs and embryos entrusted to their care.

22 202. Defendants breached these duties and acted with negligence and gross negligence in at
 23 least the following respects:

24 a. failing to adequately design, manufacture, maintain, inspect, monitor, and/or test
 25 their liquid nitrogen storage tanks, including through a functional electronic tank monitoring system
 26 capable of detecting a rise in temperature or a drop in liquid nitrogen levels and promptly alerting staff
 27 to the immediate problem;

- b. permitting a leakage or tank failure to occur with respect to one of their liquid nitrogen storage tanks—Tank 4—containing human eggs and embryos;
- c. failing to inspect and/or adequately inspect Tank 4 on a daily basis;
- d. failing to establish, maintain, and properly activate alarms;
- e. failing to establish, maintain, and properly activate autofill devices and/or generator systems;
- f. failing to disclose that it did not have appropriate processes and systems in place to protect clients' eggs and embryos;
- g. failing to properly safeguard the eggs and embryos in its care; and
- h. failing to follow reasonable scientific and laboratory procedures for safeguarding the eggs and embryos in their care.

203. Defendants' acts and omissions constitute gross negligence, because they constitute an extreme departure from what a reasonably careful person would do in the same situation to prevent foreseeable loss of eggs and embryos.

204. Defendants acted willfully, wantonly, and with conscious and reckless disregard for the rights and interests of Plaintiffs. Defendants' acts and omissions had a great probability of causing significant harm and in fact did.

205. Defendants' failure to appropriately handle and safeguard Plaintiffs' eggs and embryos has caused severe emotional distress, regardless of whether it is ever determined conclusively that the eggs and embryos in Tank 4 are not viable. Defendants' misconduct has irreparably breached trust and caused uncertainty, anxiety, and fear among Plaintiffs and other affected families over how to proceed without being informed as to the long-term effects from an egg or embryo's presence in Tank 4 during the incident.

206. As a proximate result of Defendants' negligence and/or gross negligence, Plaintiffs suffered harm in an amount to be determined at trial, including severe emotional distress consisting of shock, fright, horror, anguish, suffering, grief, anxiety, nervousness, embarrassment, humiliation, and shame. A reasonable person would be unable to cope with the losses suffered by Plaintiffs.

SECOND CAUSE OF ACTION
Breach of Contract
(Against Pacific Fertility and Prelude)

207. Plaintiffs incorporate the above allegations by reference.

208. Defendants entered into contracts with Plaintiffs, under which Defendants agreed to store and preserve their eggs and embryos or those obtained on their behalf, and under which Defendants assumed a non-delegable duty of care to ensure such safekeeping and preservation.

209. A contract involving egg and embryo storage and preservation is highly personal and implicates vital concerns regarding parenthood, procreation, and assisting others in achieving their family plans.

210. In consideration of Defendants' promises, including to keep the eggs and embryos safe and secure by following practices and protocols, including as outlined on their websites and in other marketing materials, Plaintiffs agreed to pay, and did pay, substantial sums for the services rendered.

211. Plaintiffs performed all of the terms and conditions required of them under their contracts with Defendants.

212. Based on the conduct described herein, Defendants breached their contracts with Plaintiffs, including the incorporated contractual covenant of good faith and fair dealing. Defendants' failure to safely store and preserve Plaintiffs' eggs and embryos violated commercial norms, deprived Plaintiffs of the fruits of the contracts, and contravened their objectively reasonable expectations under the contracts.

213. A contract whereby a fertility clinic undertakes to store human eggs and embryos is one as to which it is reasonably foreseeable that breach thereof will cause mental anguish to the person or persons who entrusted the clinic with such material.

214. As a direct and proximate result of Defendants' breach of contract, Plaintiffs suffered harm, including mental anguish, in an amount to be determined at trial.

THIRD CAUSE OF ACTION
Bailment
(Against Pacific Fertility and Prelude)

215. Plaintiffs incorporate the above allegations by reference.

216. Plaintiffs delivered to Defendants for safekeeping irreplaceable personal property to be safely and securely kept for the benefit of Plaintiffs, and to be redelivered to them upon demand.

217. Defendants received eggs and embryos from Plaintiffs on this condition.

218. Plaintiffs agreed to pay, and did pay, substantial sums in exchange for Defendants' promise to safeguard their eggs and embryos for the benefit of Plaintiffs.

219. Defendants had a duty to exercise care in maintaining, preserving, and protecting Plaintiffs' eggs and embryos that were delivered to Defendants. Further, Defendants had a duty to return the eggs and embryos, undamaged, to Plaintiffs, to whom the eggs and embryos belonged.

220. Defendants invited the general public, including Plaintiffs, to entrust eggs and embryos to Defendants' care by holding out Pacific Fertility as a competent, capable, and established reproductive and storage facility able to handle and care for eggs and embryos in a safe and satisfactory manner, and in a manner specified on their websites.

221. Because of Defendants' wrongful conduct, as set forth herein, the irreplaceable property of Plaintiffs was irreplaceably damaged, precluding its redelivery to them as provided for under the bailment contract.

222. Defendants breached their duty to exercise care in the safekeeping of Plaintiffs' eggs and embryos delivered to Defendants and to return the eggs and embryos, undamaged, to Plaintiffs.

223. As a direct and proximate result of Defendants' breach of bailment contract, Plaintiffs have been deprived of the opportunity to use the eggs and embryos they entrusted to Defendants, and have suffered damages in an amount to be determined at trial.

FOURTH CAUSE OF ACTION
Premises Liability
(Against Pacific Fertility and Prelude)

224. Plaintiffs incorporate the above allegations by reference.

225. At all relevant times, Pacific Fertility and Prelude owned, leased, and/or occupied the property, premises, machinery, and equipment, including Tank 4, on the premises at 55 Francisco Street, Suite 500, San Francisco, California 94133.

226. At all relevant times, Pacific Fertility and Prelude had a duty to use reasonable care to keep Plaintiffs' irreplaceable personal property in a reasonably safe condition and free from defects that would cause injury or harm to Plaintiffs' stored eggs and embryos.

227. At all relevant times, Pacific Fertility and Prelude knew, or by reasonable inspection and monitoring should have known, of the defective condition of the premises, and specifically of Tank 4.

228. At all relevant times, Pacific Fertility and Prelude were careless and negligent in the ownership, management, control and maintenance of the aforementioned real property, such that Plaintiffs, whose cryopreserved eggs and embryos were entrusted to Pacific Fertility and Prelude's care, were harmed.

229. By reason of the foregoing, and as a direct and legal cause thereof, Plaintiffs have suffered injury, loss, harm, and damages.

FIFTH CAUSE OF ACTION

Breach of Fiduciary Duty – Failure to Use Reasonable Care (Against Pacific Fertility and Prelude)

230. Plaintiffs incorporate the above allegations by reference.

231. At all times herein mentioned, Pacific Fertility and Prelude were the fiduciaries of Plaintiffs because they agreed to store, safeguard, secure, maintain, and account for Plaintiffs' eggs and embryos and because they represented that they were experts in the field of maintenance and protection of eggs and embryos.

232. Pacific Fertility and Prelude acted on Plaintiffs' behalf for purposes of the maintenance and protection of Plaintiffs' eggs and embryos.

233. Pacific Fertility and Prelude failed to act as a reasonably careful fiduciary would have acted under the same or similar circumstances with respect to the maintenance and protection of the eggs and embryos entrusted to their care.

234. Pacific Fertility and Prelude's breach of fiduciary duty was a substantial factor in causing harm to Plaintiffs.

SIXTH CAUSE OF ACTION

**Violations of the Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et seq.*
(Against All Defendants)**

235. Plaintiffs incorporate the above allegations by reference.

236. The UCL prohibits acts of “unfair competition,” including any “unlawful, unfair or fraudulent business act or practice.”

237. Defendants’ conduct set forth herein is unlawful because it constitutes negligence, gross negligence, breach of contract, bailment, breach of fiduciary duty, deceit, and strict products liability.

238. Defendants’ conduct is unfair because it is immoral, unethical, unscrupulous, oppressive, and substantially injurious. Plaintiffs entrusted Defendants with their eggs and embryos to preserve their options for procreation, parenting, or assisting others experiencing infertility.

Defendants breached that trust by, among other things:

a. failing to adequately design, manufacture, maintain, inspect, monitor, and/or test their liquid nitrogen storage tanks, including through a functional electronic tank monitoring system capable of detecting a rise in temperature or a drop in liquid nitrogen levels and promptly alerting staff to the immediate problem;

b. permitting a leakage or tank failure to occur with respect to one of their liquid nitrogen storage tanks—Tank 4—containing human eggs and embryos;

c. failing to inspect and/or adequately inspect Tank 4 on a daily basis;

d. failing to establish, maintain, and properly activate alarms;

e. failing to establish, maintain, and properly activate autofill devices and/or generator systems;

f. failing to disclose that it did not have appropriate processes and systems in place to protect clients’ eggs and embryos;

g. failing to properly safeguard the eggs and embryos in its care; and

h. failing to follow reasonable scientific and laboratory procedures for safeguarding the eggs and embryos in their care.

239. The gravity of the harm resulting from Defendants' conduct far outweighs any conceivable utility of this conduct. There are reasonably available alternatives that would further Defendants' legitimate business interests, such as implementing reasonable protocols and procedures, as promised, to prevent a catastrophic failure.

240. Plaintiffs could not have reasonably avoided injury from Defendants' unfair conduct. Plaintiffs did not know, and had no reasonable means of learning, that Defendants were not adequately safeguarding the eggs and embryos in their custody and control.

241. Defendants' conduct also is fraudulent in violation of the UCL because it is likely to deceive a reasonable consumer.

242. Defendants knowingly and intentionally concealed from Plaintiffs that their electronic monitoring and alarm and response systems and processes, and other equipment, including the storage tank, were inadequate to protect against damage to Plaintiffs' eggs and embryos.

243. Defendants volunteered specific information to Plaintiffs through advertising, on websites, and in documents that their storage services were high quality, including representing that a tank could go without power or liquid nitrogen for "several days" without damaging the tissue it contained. Plaintiffs viewed and relied upon Defendants' representations that their storage services were high quality, safe, and reliable.

244. Defendants made these specific representations despite knowing their systems were inadequate to protect against damage to Plaintiffs' eggs and embryos.

245. Defendants had ample means and opportunities to alert Plaintiffs to the fact that their electronic monitoring and alarm and response systems and processes were inadequate to protect against damage to Plaintiffs' eggs and embryos. Defendants failed to disclose such inadequacies to Plaintiffs. Had Defendants disclosed such inadequacies to Plaintiffs, Plaintiffs would not have purchased Defendants' egg and embryo storage services.

246. Defendants were under a duty to disclose that their storage systems and processes were inadequate given their exclusive knowledge of the inadequacies and because they made partial representations about their storage services without disclosing the inadequacies.

247. As a direct and proximate result of Defendants' unlawful and unfair conduct, Plaintiffs have suffered injuries in fact and seek appropriate relief under the UCL, including injunctive relief and restitution.

248. The requested injunction under the UCL will primarily benefit the interests of the general public. It will have the primary purpose and effect of prohibiting unlawful acts that threaten injury to members of the public who have placed, or who in the future will place, reproductive tissue under Defendants' care.

SEVENTH CAUSE OF ACTION

Violations of the Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* (Against Pacific Fertility and Prelude)

249. Plaintiffs incorporate the above allegations by reference.

250. Pacific Fertility and Prelude are "persons" as defined by Civil Code §§ 1761(c) and 1770 and have provided "services" as defined by Civil Code §§ 1761(b) and 1770.

251. Plaintiffs are "consumers" as defined by Civil Code §§ 1761(d) and 1770 and have engaged in "transaction[s]" as defined by Civil Code §§ 1761(e) and 1770.

252. Pacific Fertility and Prelude's acts and practices were intended to and did result in the sale of services to Plaintiffs, and those acts and practices violated Civil Code § 1770, including by:

- a. representing that their services had characteristics, uses, and benefits that they did not have;
- b. representing that their services were of a particular standard, quality, or grade, when they were not;
- c. advertising services with intent not to sell them as advertised; and
- d. representing that the subject of a transaction had been supplied in accordance with a previous representation when it had not.

253. Pacific Fertility and Prelude's acts and practices violated the Consumers Legal Remedies Act by failing to disclose information in the context of transactions.

254. Pacific Fertility and Prelude knew that their equipment, systems, and processes, including Defendants' storage tank, electronic monitoring, alarm, and response systems and processes, were inadequate to safely store Plaintiffs' eggs and embryos.

255. Pacific Fertility and Prelude were under a duty to disclose that their equipment, systems, and processes were inadequate because they actively concealed this information and because they had exclusive knowledge, not known or reasonably accessible to Plaintiffs, of the inadequacy of their equipment, systems, and processes. They were also subject to a duty to disclose because the information they failed to disclose was contrary to partial representations they made concerning the adequacy of their equipment, systems, and processes.

256. Pacific Fertility and Prelude had ample means and opportunities to alert Plaintiffs to the fact that their equipment, systems, and processes were inadequate, including in person when meeting with Plaintiffs before egg and embryo storage. Despite their opportunities to do so, Pacific Fertility and Prelude failed to disclose to Plaintiffs, and actively concealed, that Defendants' equipment, systems, and processes were inadequate to safely store human reproductive tissue.

257. Pacific Fertility and Prelude's omissions were material because reasonable consumers would consider important, and would want to be told, information about the inadequacy of Defendants' equipment, systems, or processes connected to their ability to safely store Plaintiffs' eggs and embryos.

258. As a direct and proximate result of this conduct, Plaintiffs have suffered damage. Had Defendants not misrepresented the adequacy of, and concealed the inadequacy of, their equipment, systems, and processes, Plaintiffs would not have purchased Defendants' services and would not have gone through the time and emotional investment to store their reproductive tissue with Defendants. In the meantime, Pacific Fertility and Prelude generated more revenue than they otherwise would have, unjustly enriching themselves.

259. Plaintiffs are entitled to equitable relief, reasonable attorneys' fees and costs, declaratory relief, and a permanent injunction enjoining Pacific Fertility and Prelude from their unlawful, fraudulent, and deceitful activity.

260. Pursuant to Cal. Civ. Code § 1782(a), Plaintiffs will send letters to Defendants notifying them of their CLRA violations and providing them with the opportunity to correct their business

practices. If Pacific Fertility and Prelude do not correct their business practices, Plaintiffs will amend (or seek leave to amend) the complaint to add claims for monetary relief, including for actual, restitutionary, emotional distress, and punitive damages under the CLRA.

261. The conduct of Pacific Fertility and Prelude set forth herein was reprehensible and subjected Plaintiffs to cruel and unjust hardship in conscious disregard of their rights, constituting oppression, for which Pacific Fertility and Prelude must be punished by punitive and exemplary damages in an amount according to proof. Pacific Fertility and Prelude's behavior evidences a conscious disregard for the safety of the eggs and embryos entrusted to them, and by extension, those who placed the eggs and embryos in their care, including Plaintiffs. Pacific Fertility and Prelude's conduct was and is despicable conduct and constitutes malice under Section 3294 of the California Civil Code. An officer, director, or managing agent of Pacific Fertility and Prelude personally committed, authorized, and/or ratified the reprehensible conduct set forth herein. Plaintiffs are entitled to an award of punitive damages sufficient to punish and make an example of these Defendants.

EIGHTH CAUSE OF ACTION
Deceit and Fraudulent Concealment
(Against Pacific Fertility and Prelude)

262. Plaintiffs incorporate the above allegations by reference.

263. Defendants marketed and promoted their services and made representations to the public and to Plaintiffs that they were experts in cryopreservation, had state-of-the-art facilities, and would safely preserve and store Plaintiffs' eggs and embryos in liquid nitrogen according to certain protocols and standards until they were ready to use them.

264. Defendants' representations were false, and Defendants either knew the truth or made the representations without regard for the truth.

265. Defendants intended for Plaintiffs to rely on their representations and engage Defendants to perform services to preserve Plaintiffs' eggs and embryos, and Plaintiffs reasonably relied on Defendants' representations when availing themselves of Defendants' services for egg and embryo storage.

266. Defendants intentionally suppressed and concealed material facts concerning the adequacy of its storage systems and processes. Defendants knew or reasonably should have known their electronic monitoring and alarm storage systems and processes were inadequate to protect against damage to Plaintiffs' eggs and embryos. Though it is standard in the industry to do so, Defendants did not equip Tank 4 with a liquid nitrogen autofilling system sufficient to replenish declining liquid nitrogen levels. Defendants willfully omitted to disclose the inadequate nature of its storage systems and processes to Plaintiffs.

267. Plaintiffs had no reasonable means of knowing Defendants' storage systems and processes were inadequate, or that Defendants' representations about such systems were incomplete, false, or misleading in that they failed to disclose such inadequacies. Plaintiffs did not and reasonably could not have discovered Defendants' deception prior to purchasing their storage services.

268. Defendants had ample means and opportunities to alert Plaintiffs to the fact that their electronic monitoring and alarm and response systems and processes were inadequate to protect against damage to Plaintiffs' eggs and embryos. Defendants willfully failed to disclose such inadequacies to Plaintiffs. Had Defendants disclosed the inadequacies to Plaintiffs, they would not have purchased Defendants' egg and embryo storage services.

269. Defendants were under a duty to disclose that their storage systems and processes were inadequate given their exclusive knowledge of the inadequacies and because they made partial representations about their storage services without disclosing the inadequacies.

270. Plaintiffs reasonably relied to their detriment upon Defendants' material omissions regarding the adequacy of their storage systems and processes. Plaintiffs were unaware of the omitted material facts and would not have acted as they did had these facts been disclosed. Had Plaintiffs known that Defendants' storage systems and processes were inadequate to protect against damage to their eggs and/or embryos, they would not have purchased such services.

271. Plaintiffs sustained damage as a direct and proximate result of Defendants' deceit and fraudulent concealment.

272. The foregoing acts and omissions of Defendants were committed maliciously, oppressively, deliberately, with intent to defraud, and in reckless disregard of Plaintiffs' rights,

interests, and well-being to enrich Defendants. Defendants' conduct warrants an assessment of punitive damages in an amount sufficient to deter such conduct in the future, which amount is to be determined according to proof.

NINTH CAUSE OF ACTION
Strict Products Liability – Failure to Warn
(Against Chart)

273. Plaintiffs incorporate the above allegations by reference.

274. Chart manufactured, distributed, and/or sold the cryogenic equipment used at Pacific Fertility, including Tank 4.

275. The cryogenic storage tank at issue had potential risks that were known or knowable in light of the scientific and medical knowledge that was generally accepted in the scientific and medical community at the time of the manufacture, distribution, or sale of the cryogenic storage Tank 4.

276. The cryogenic storage Tank 4 was defective and unreasonably dangerous when it left Chart's possession because it did not contain adequate warnings, including warnings concerning certain risks, including the risk of defective seals that may result in catastrophic nitrogen loss, the risk of nitrogen loss and prevalence of this occurrence, the risk of a rise in temperature and the fact that the tanks are not equipped with sufficient alarms to notify users of catastrophic nitrogen loss or a rise in temperature that can damage and/or cause destruction of eggs or embryos, the rate of failure of the cryogenic storage tanks in the preservation of eggs or embryos or other human tissue, and the need for maintenance, inspection, and/or replacement of the cryogenic storage tanks.

277. The potential risks presented a substantial danger when the cryogenic storage tank at issue was used or misused in an intended or reasonably foreseeable way.

278. The ordinary consumer would not have recognized the potential for risks.

279. Chart had constructive notice or knowledge and knew, or in the exercise of reasonable care, should have known that the cryogenic storage Tank 4 was dangerous, had risks, and/or was defective in manufacture and/or design, including that it could cause nitrogen loss and would damage and/or cause the destruction of cryopreserved materials, including eggs or embryos.

280. Chart failed to adequately warn or instruct concerning the potential risks of the cryogenic storage tank.

281. It was foreseeable to Chart that failure to adequately warn about the risks of its cryogenic storage tank would cause irreparable harm to those whose eggs and embryos were cryopreserved therein, including the types of emotional distress suffered by Plaintiffs.

282. As a result of Chart's failures to adequately warn, Plaintiffs were harmed as described herein, regardless of whether it is ever determined conclusively that certain eggs and embryos in Tank 4 are not viable. The lack of sufficient instructions and warnings was a substantial factor in causing Plaintiffs' harm.

TENTH CAUSE OF ACTION
Strict Products Liability – Manufacturing Defect
(Against Chart)

283. Plaintiffs incorporate the above allegations by reference.

284. Chart manufactured, distributed, and/or sold the cryogenic storage Tank 4.

285. The cryogenic storage tank contained a manufacturing defect when it left Chart's possession.

286. Chart had constructive notice or knowledge and knew, or in the exercise of reasonable care, should have known that the cryogenic storage tanks were dangerous, had risks, and/or were defective in manufacture, including that they could cause nitrogen loss and would damage and/or cause the destruction of cryopreserved materials, including eggs or embryos.

287. As a result of Chart's conduct, Plaintiffs were harmed as described herein, regardless of whether it is ever determined conclusively that certain eggs and embryos in Tank 4 are not viable.

288. The defective nature of the cryogenic storage tank was a substantial factor in causing Plaintiffs' harm.

ELEVENTH CAUSE OF ACTION
Strict Products Liability — Design Defect — Consumer Expectations Test
(Against Chart)

289. Plaintiffs incorporate the above allegations by reference.

290. Chart manufactured, distributed, and/or sold the cryogenic storage Tank 4.

291. The cryogenic storage tank did not perform as safely as an ordinary consumer would have expected it to perform when used in an intended or reasonably foreseeable way.

292. Chart had constructive notice or knowledge and knew, or in the exercise of reasonable care, should have known that the cryogenic storage tanks were dangerous, had risks, and/or were defective, including in design, including that they could result in nitrogen loss and would damage and/or cause the destruction of cryopreserved materials, including eggs or embryos.

293. As a result of Chart's conduct, Plaintiffs were harmed as described herein, regardless of whether it is ever determined conclusively that certain eggs and embryos in Tank 4 are not viable.

294. The cryogenic storage tank's failure to perform safely was a substantial factor in causing Plaintiffs' harm.

TWELFTH CAUSE OF ACTION
Strict Products Liability – Design Defect – Risk-Utility Test
(Against Chart)

295. Plaintiffs incorporate the above allegations by reference.

296. Chart manufactured, distributed, and/or sold the cryogenic storage Tank 4.

297. The benefits of this tank's design are not outweighed by its risks, considering the gravity of the potential harm resulting from the use of the tank, the likelihood that the harm would occur, the feasibility of an alternative safer design at the time of manufacture, and the disadvantages of an alternative design.

298. Chart had constructive notice or knowledge and knew, or in the exercise of reasonable care, should have known that the cryogenic storage tanks were dangerous, had risks, and/or were defective in design, including that they could result in nitrogen loss and would damage and/or cause the destruction of cryopreserved materials, including eggs or embryos.

299. Plaintiffs were harmed because the tank lost liquid nitrogen.

300. Chart's design of the tank was a substantial factor in causing Plaintiffs' harm.

THIRTEENTH CAUSE OF ACTION
Negligent Failure to Recall
(Against Chart)

301. Plaintiffs incorporate the above allegations by reference.

302. Chart acted negligently by failing to recall, prior to the incident of March 4, 2018, the line of tanks that included Tank 4.

303. Chart manufactured, distributed, and/or sold this line of tanks.

304. Chart knew or reasonably should have known that, when used as intended, Tank 4 presented or was likely to present a danger to eggs and embryos. Chart knew or reasonably should have known that the vacuum seal on Tank 4 was vulnerable to breach, and that upon such breach liquid nitrogen levels would drop, causing the eggs and embryos stored inside the tank to reach dangerously elevated temperatures.

305. After Chart sold Tank 4 to Pacific Fertility and before March 4, 2018, Chart knew or reasonably should have known that the tank was susceptible to its vacuum seal breaking. Nevertheless, at no point during this time period did Chart recall, repair, or warn of the danger posed by the tank.

306. A reasonable manufacturer, distributor, or seller facing the same or similar circumstances as Chart would have recalled Tank 4 to ensure eggs and embryos were not endangered.

307. Chart's failure to timely recall Tank 4 was a substantial factor in causing harm to Plaintiffs. Had Chart recalled Tank 4 before the incident, the other Defendants would not have used it, and it would not have failed while Plaintiffs' eggs and embryos were stored within it.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the class defined above, respectfully request that the Court:

A. Certify the class under Fed. R. Civ. P. 23(a), (b)(1), (b)(2), (b)(3), and/or (c)(4), as appropriate; appoint Plaintiffs as representatives of the class; and appoint the undersigned counsel as class counsel;

B. Award Plaintiffs compensatory, restitutionary, rescissory, general, consequential, punitive and/or exemplary damages in an amount to be determined at trial;

C. Award prejudgment interest as permitted by law;

D. Enter an injunction against Defendants and their officers, agents, successors, employees, representatives, assigns, and any and all persons acting in concert with them, to ensure Defendants' compliance with California Business and Professions Code section 17200 *et seq.*;

E. Enter an injunction against Defendants and their officers, agents, successors, employees, representatives, assigns, and any and all persons acting in concert with them, mandating that Defendants cease engaging in unfair competition as set forth above;

F. Appoint a monitor to ensure Defendants comply with the injunctive provisions of any decree of this Court;

G. Retain jurisdiction over this action to ensure Defendants comply with such a decree;

H. Enter other appropriate equitable relief;

I. Award reasonable attorneys' fees and costs, as provided for by law; and

J. Grant such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all issues so triable.

Dated: May 30, 2018

Respectfully submitted,

By: /s/ Adam E. Polk

Daniel C. Girard (State Bar No. 114826)
Steven M. Tindall (State Bar No. 187862)
Jordan Elias (State Bar No. 228731)
Adam E. Polk (State Bar No. 273000)

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By: /s/ Adam B. Wolf

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Tracey B. Cowan (State Bar No. 250053)

PEIFFER WOLF CARR & KANE,

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4 Embarcadero Center, Suite 1400

San Francisco, CA 94111

Tel: (415) 766-3545
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tcowan@pwcklegal.com

By: /s/ Sarah R. London
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Lexi J. Hazam (State Bar No. 224457)
Sarah R. London (State Bar No. 267083)
Tiseme G. Zegeye (State Bar No. 319927)
**LIEFF CABRASER HEIMANN &
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Interim Class Counsel

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jgs@sstrialawyers.com

Plaintiffs' Counsel

ATTESTATION

I, Adam E. Polk, am the ECF User whose identification and password are being used to file this Consolidated Amended Class Action Complaint. Pursuant to Civil L.R. 5-1(i)(3), I attest under penalty of perjury that concurrence in this filing has been obtained by all counsel listed above.

Dated: May 30, 2018

/s/ Adam E. Polk
Adam E. Polk

REDACTED
FILED UNDER SEAL

EXHIBIT 3

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11 **UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14 **IN RE PACIFIC FERTILITY CENTER**
15 **LITIGATION**

Case No. 3:18-cv-01586-JSC

16 **CLRA VENUE DECLARATION OF**
17 **PLAINTIFF [REDACTED]**
18 **PURSUANT TO CALIFORNIA CIVIL**
19 **CODE SECTION 1780(d)**
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1 I, [REDACTED], declare as follows:

2 1. I have personal knowledge of the facts stated herein and, if called upon to do so, could
3 competently testify thereto.

4 2. I am a Plaintiff in the above-captioned action.

5 3. I submit this declaration in support of the First Amended Consolidated Class Action
6 Complaint, which is based in part on violations of the Consumers Legal Remedies Act, California Civil
7 Code section 1750 *et seq.*

8 4. The First Amended Consolidated Class Action Complaint has been filed in the proper
9 place for trial of this action.

10 5. Defendant San Francisco Fertility Centers, d/b/a Pacific Fertility Center ("PFC"), has its
11 principal place of business in San Francisco, California, which is within San Francisco County. PFC
12 conducts substantial business, including the acts and practices at issue in this action, within San
13 Francisco County.

14 6. I purchased long-term freezer storage for my embryos in California from PFC.

15
16 I declare under penalty of perjury under the laws of the United States that the foregoing is true
17 and correct to the best of my knowledge. Executed on November 23, 2018 in Forest, Ohio.

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20 By: [REDACTED] _____
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REDACTED
FILED UNDER SEAL

EXHIBIT 4

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11 **UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14 IN RE PACIFIC FERTILITY CENTER
15 LITIGATION

Case No. 3:18-cv-01586-JSC

16 **CLRA VENUE DECLARATION OF**
17 **PLAINTIFF [REDACTED] [REDACTED]**
18 **PURSUANT TO CALIFORNIA CIVIL**
19 **CODE SECTION 1780(d)**

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CLRA VENUE DECLARATION OF PLAINTIFF [REDACTED] [REDACTED] PURSUANT TO
CALIFORNIA CIVIL CODE SECTION 1780(d)
CASE NO. 3:18-CV-01586-JSC

1 I [REDACTED], declare as follows:

2 1. I have personal knowledge of the facts stated herein and, if called upon to do so, could
3 competently testify thereto.

4 2. I am a Plaintiff in the above-captioned action.

5 3. I submit this declaration in support of the First Amended Consolidated Class Action
6 Complaint, which is based in part on violations of the Consumers Legal Remedies Act, California Civil
7 Code section 1750 *et seq.*

8 4. The First Amended Consolidated Class Action Complaint has been filed in the proper
9 place for trial of this action.

10 5. Defendant San Francisco Fertility Centers, d/b/a Pacific Fertility Center ("PFC"), has its
11 principal place of business in San Francisco, California, which is within San Francisco County. PFC
12 conducts substantial business, including the acts and practices at issue in this action, within San
13 Francisco County.

14 6. I purchased long-term freezer storage for my embryos in California from PFC.

15
16 I declare under penalty of perjury under the laws of the United States that the foregoing is true
17 and correct to the best of my knowledge. Executed on November 23, 2018 in Forest, Ohio.

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20 By: [REDACTED]

REDACTED
FILED UNDER SEAL

EXHIBIT 5

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE PACIFIC FERTILITY CENTER
LITIGATION

Case No. 3:18-cv-01586-JSC

**CLRA VENUE DECLARATION OF
PLAINTIFF [REDACTED]
PURSUANT TO CALIFORNIA CIVIL
CODE SECTION 1780(d)**

1 I [REDACTED], declare as follows:

2 1. I have personal knowledge of the facts stated herein and, if called upon to do so, could
3 competently testify thereto.

4 2. I am a Plaintiff in the above-captioned action.

5 3. I am a resident of San Francisco County, California.

6 4. I submit this declaration in support of the First Amended Consolidated Class Action
7 Complaint, which is based in part on violations of the Consumers Legal Remedies Act, California Civil
8 Code section 1750 *et seq.*

9 5. The First Amended Consolidated Class Action Complaint has been filed in the proper
10 place for trial of this action.

11 6. Defendant San Francisco Fertility Centers, d/b/a Pacific Fertility Center ("PFC"), has its
12 principal place of business in San Francisco, California, which is within San Francisco County. PFC
13 conducts substantial business, including the acts and practices at issue in this action, within San
14 Francisco County.

15 7. I purchased long-term freezer storage for my eggs in California from PFC.

16
17 I declare under penalty of perjury under the laws of the United States that the foregoing is true
18 and correct to the best of my knowledge. Executed on November 20, 2018 in London, England,
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21 By: _____
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REDACTED
FILED UNDER SEAL

EXHIBIT 6

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11 **UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14 **IN RE PACIFIC FERTILITY CENTER**
15 **LITIGATION**
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Case No. 3:18-cv-01586-JSC

CLRA VENUE DECLARATION OF
PLAINTIFF [REDACTED]
PURSUANT TO CALIFORNIA CIVIL
CODE SECTION 1780(d)

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CLRA VENUE DECLARATION OF PLAINTIFF [REDACTED] PURSUANT TO
CALIFORNIA CIVIL CODE SECTION 1780(d)
CASE NO. 3:18-CV-01586-JSC

1 I, [REDACTED] declare as follows:

2 1. I have personal knowledge of the facts stated herein and, if called upon to do so, could
3 competently testify thereto.

4 2. I am a Plaintiff in the above-captioned action.

5 3. I am a resident of San Francisco County, California.

6 4. I submit this declaration in support of the First Amended Consolidated Class Action
7 Complaint, which is based in part on violations of the Consumers Legal Remedies Act, California Civil
8 Code section 1750 *et seq.*

9 5. The First Amended Consolidated Class Action Complaint has been filed in the proper
10 place for trial of this action.

11 6. Defendant San Francisco Fertility Centers, d/b/a Pacific Fertility Center ("PFC"), has its
12 principal place of business in San Francisco, California, which is within San Francisco County. PFC
13 conducts substantial business, including the acts and practices at issue in this action, within San
14 Francisco County.

15 7. I purchased long-term freezer storage for my eggs in California from PFC.

16
17 I declare under penalty of perjury under the laws of the United States that the foregoing is true
18 and correct to the best of my knowledge. Executed on November 20, 2018 in San Francisco,
19 CA.

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21 By: [REDACTED]
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REDACTED
FILED UNDER SEAL

EXHIBIT 7

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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE PACIFIC FERTILITY CENTER
LITIGATION

Case No. 3:18-cv-01586-JSC

**CLRA VENUE DECLARATION OF
PLAINTIFF [REDACTED] PURSUANT TO
CALIFORNIA CIVIL CODE SECTION
1780(d)**

1 I, [REDACTED], declare as follows:

2 1. I have personal knowledge of the facts stated herein and, if called upon to do so, could
3 competently testify thereto.

4 2. I am a Plaintiff in the above-captioned action.

5 3. I am a resident of Contra Costa County, California.

6 4. I submit this declaration in support of the First Amended Consolidated Class Action
7 Complaint, which is based in part on violations of the Consumers Legal Remedies Act, California Civil
8 Code section 1750 *et seq.*

9 5. The First Amended Consolidated Class Action Complaint has been filed in the proper
10 place for trial of this action.

11 6. Defendant San Francisco Fertility Centers, d/b/a Pacific Fertility Center ("PFC"), has its
12 principal place of business in San Francisco, California, which is within San Francisco County. PFC
13 conducts substantial business, including the acts and practices at issue in this action, within San
14 Francisco County.

15 7. I purchased long-term freezer storage for my eggs in California from PFC.

16
17 I declare under penalty of perjury under the laws of the United States that the foregoing is true
18 and correct to the best of my knowledge. Executed on November ¹⁹____, 2018 in Lafayette,
19 California.

REDACTED
FILED UNDER SEAL

EXHIBIT 8

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE PACIFIC FERTILITY CENTER
LITIGATION

Case No. 3:18-cv-01586-JSC

**CLRA VENUE DECLARATION OF
PLAINTIFF [REDACTED]
PURSUANT TO CALIFORNIA CIVIL
CODE SECTION 1780(d)**

**CLRA VENUE DECLARATION OF PLAINTIFF [REDACTED] PURSUANT TO
CALIFORNIA CIVIL CODE SECTION 1780(d)
CASE NO. 3:18-CV-01586-JSC**

I, [REDACTED], declare as follows:

1. I have personal knowledge of the facts stated herein and, if called upon to do so, could competently testify thereto.
2. I am a Plaintiff in the above-captioned action.
3. I am a resident of San Francisco County, California.
4. I submit this declaration in support of the First Amended Consolidated Class Action Complaint, which is based in part on violations of the Consumers Legal Remedies Act, California Civil Code section 1750 *et seq.*
5. The First Amended Consolidated Class Action Complaint has been filed in the proper place for trial of this action.
6. Defendant San Francisco Fertility Centers, d/b/a Pacific Fertility Center ("PFC"), has its principal place of business in San Francisco, California, which is within San Francisco County. PFC conducts substantial business, including the acts and practices at issue in this action, within San Francisco County.
7. I purchased long-term freezer storage for my eggs in California from PFC.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge. Executed on November 29, 2018 in San Francisco, CA.

By [REDACTED] _____

REDACTED
FILED UNDER SEAL

EXHIBIT 9

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11 **UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14 IN RE PACIFIC FERTILITY CENTER
15 LITIGATION

Case No. 3:18-cv-01586-JSC

16 **CLRA VENUE DECLARATION OF**
17 **PLAINTIFFS** [REDACTED]

18 **[REDACTED] PURSUANT TO**
19 **CALIFORNIA CIVIL CODE SECTION**
20 **1780(d)**

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28 **CLRA VENUE DECLARATION OF PLAINTIFF** [REDACTED]

[REDACTED] PURSUANT TO
CALIFORNIA CIVIL CODE SECTION 1780(d)
CASE NO. 3:18-CV-01586-JSC

1 We, [REDACTED] declare as follows:

2 1. We have personal knowledge of the facts stated herein and, if called upon to do so, could
3 competently testify thereto.

4 2. We are Plaintiffs in the above-captioned action.

5 3. We are residents of San Mateo County, California.

6 4. We submit this declaration in support of the First Amended Consolidated Class Action
7 Complaint, which is based in part on violations of the Consumers Legal Remedies Act, California Civil
8 Code section 1750 *et seq.*

9 5. The First Amended Consolidated Class Action Complaint has been filed in the proper
10 place for trial of this action.

11 6. Defendant San Francisco Fertility Centers, d/b/a Pacific Fertility Center ("PFC"), has its
12 principal place of business in San Francisco, California, which is within San Francisco County. PFC
13 conducts substantial business, including the acts and practices at issue in this action, within San
14 Francisco County.

15 7. We purchased long-term freezer storage for [REDACTED] eggs in California from PFC.

16
17 I declare under penalty of perjury under the laws of the United States that the foregoing is true
18 and correct to the best of my knowledge. Executed on November 25, 2018 in Menlo Park, California.

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21 By: [REDACTED]
[REDACTED]

22
23 I declare under penalty of perjury under the laws of the United States that the foregoing is true
24 and correct to the best of my knowledge. Executed on November 25, 2018 in Menlo Park, California.

25
26 By: [REDACTED]
[REDACTED]

27
28 CLRA VENUE DECLARATION OF PLAINTIFFS [REDACTED]

[REDACTED] PURSUANT TO
CALIFORNIA CIVIL CODE SECTION 1780(d)
CASE NO. 3:18-CV-01586-JSC